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RECORD, CASE No. 14,367.

892

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No, 320.

ERWIN DAVIS, APPELLANT,

vs.

THE MERCANTILE TRUST COMPANY, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 21, 1890.

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1 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

At a stated term of the circuit court of the United States of America within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America begun and had in the court-rooms, at the city of Columbus, Ohio, in said district, on the first Tuesday of December, being also the third day of that month, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and fourteenth — present, the Honorable Henry B. Brown, district judge of the eastern district of Michigan—among the proceedings had were the following, to wit:

THE MERCANTILE TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE KANAWHA & OHIO RAILWAY COMPANY, Defendant.
} In Equity. # 279.

Be it remembered that heretofore, to wit, on the 18th day of February, A. D. 1889, came the complainants, by their solicitors, and filed in the clerk's office of said court their certain bill of complaint herein against the defendants, The Kanawha & Ohio Railway Company; said bill of complaint is clothed in the words and figures following, to wit:

Bill of Complaint.

2 In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio, sitting in equity:

The Mercantile Trust Company, a corporation created by and existing under the laws of the State of New York and a citizen and resident of said State, and having its principal office for the transaction of business in the city and State of New York, brings this its bill of complaint against The Kanawha and Ohio Railway Company, a corporation created by and existing under the laws of the States of Ohio and West Virginia (and a citizen and resident of said States of Ohio and West Virginia) and having its principal office for the transaction of business in the State of Ohio in the city of Columbus, in said State, and in the State of West Virginia in the city of Charleston, in said State; and thereupon your orator complains and says:

I. That on and prior to the first day of May, in the year one thousand eight hundred and eighty-six, the Kanawha and Ohio Railway Company aforesaid was and ever since has been a body

politic and corporate of that name and style, with all the powers, rights, privileges, and franchises and immunities granted by the laws of the State of Ohio and the laws of the State of West Virginia to corporations formed under the laws of said respective States for the construction, operation, and maintenance of railroad- in said States, and was the owner of and in possession of the railroad and property and held the rights and franchises mentioned in the mortgage or deed of trust hereinafter mentioned.

II. That the complainant, The Mercantile Trust Company, during the same time was and still is a corporation duly
3 organized and existing under the laws of the State of New York, and having power under said laws to accept and execute such trusts as that created by the mortgage hereinafter mentioned.

III. That on or about the first day of May, in the year one thousand eight hundred and eighty-six, said The Kanawha and Ohio Railway Co. duly made and executed its certain bonds, dated on that day, each for the payment to bearer, or, in case of registry, to the registered owner, of one thousand dollars in gold coin of the United States, of the then present standard of weight and fineness, at the office or agency of said company in the city of New York, on the first day of January, in the year one thousand nine hundred and thirty-six, and for the payment, on presentation and surrender of the annexed coupons as they should severally become due, of interest thereon at the rate of 6 % per annum from the 1st day of July, 1886, until such principal should be paid, such interest being payable in like coin, at said office or agency, on the first days of January and July in each year, the said bonds and coupons being in the forms shown in the mortgage hereinafter referred to.

IV. That, to secure the payment of the principal and interest of said bonds, the said The Kanawha and Ohio Railway Co., on or about the 1st day of May, one thousand eight hundred and eighty-six, duly made, executed, and delivered to the said The Mercantile Trust Company its certain mortgage or deed of trust, dated on that day, and thereby conveyed to the said The Mercantile Trust Co., as trustee, and its successors and assigns, the property and rights therein described, as follows: "All and singular the railroad of
4 the said The Kanawha and Ohio Railway Company extending from a point in the village of Corning, in the township of Monroe, in the county of Perry, in the State of Ohio, through the counties of Perry and Athens, by way of Jacksonville, to a point within or near South Shawnee, in said county of Perry, and through or into the counties of Perry, Athens, Meigs, and Gallia, by way of Athens and Middleport, to a point on the Ohio river opposite the village of Point Pleasant, in the State of West Virginia, and thence across the Ohio river, and through the counties of Mason, Putnam, Kanawha, and Fayette, by way of Charleston, and, in general, along or near the northeasterly bank of the Kanawha river to a point at or near the mouth of the Gauley river, in said county of Fayette, in said State of West Virginia, constructed or to be constructed, and as the same is now or may hereafter be located, and

whether now acquired or to be hereafter acquired, including all and singular the railroad, lands, and other property which were conveyed to the said The Ohio and Kanawha Railway Company by Erwin Davis and Emily B., his wife; Albert Gallup and Edward C. Homans and Francis E., his wife, by deed dated the 29th day of January, in the year one thousand eight hundred and eighty-six, and including also all and singular the railroads, lands, and other property (except the coal lands and mineral rights in Raleigh county) which were conveyed to the said The Kanawha and Ohio Railway Company, a corporation of the State of West Virginia, by the said Erwin Davis and Emily B., his wife; Albert Gallup, and Edward C. Homans and Francis E., his wife, by deed dated the 29th day of January, one thousand eight hundred and eighty-six.

And also all and singular the lands, tenements, and hereditaments, rights of way and easements, and all other interests in land, including lands held or acquired for the purposes of depots,
5 stations, terminals, or ferries, now held or hereafter acquired by said railway Co. in connection with said railroad or for the uses therefor.

And also all letters patent, grants of land, and of land under water, and of water rights and all leaseholds, leases, terms, and parts of terms, rights under leases or contracts, covenants, or agreements, and all rights of trackage, terminal, bridge, and ferry rights, privileges, and franchises, and all licenses, permits, and privileges from the Government of the United States or from the State of Ohio or the State of West Virginia or by any governmental or municipal authority, and all other rights & privileges, general or special, now held or hereafter acquired by said railway Co. for the purposes of said railroad or any part thereof.

And also all railways, tracks, sidings, spurs, turnouts, bridges, station-houses, depots, freight-houses, warehouses, elevators, round-houses, car-houses, storehouses, turn-tables, water tanks, machine shops and repair shops, and other structures, buildings, erections, and fixtures of every kind and nature whatsoever now held or which may hereafter be acquired by the said railway company for the uses and purposes of the said railway or in connection therewith or in the business thereof.

And also all locomotives, engines, cars, and other rolling stock and railway equipment, and all ferry-boats, steamboats, tug-boats, floats, barges, and other floating equipment, and all tools, rails, ties, machinery, implements, fuel and materials now held or which may hereafter be acquired for the uses or purposes of the said railway or in connection therewith or the business thereof.

And also all other property, real, personal, or mixed, now held or which may hereafter be acquired for the purposes of the said railway or for the use thereof or in connection with the construction, operation or maintenance, reparation or replacement of
6 the said railway or any part thereof or as convenient or necessary for the uses or purposes thereof.

And also all rights, powers, privileges, and franchises connected with or relating to the said railway and other property, including

the right to operate and maintain the said railway and other property, whether now held or hereafter acquired by the said railway company and connected with or relating to the said railway or for the uses or purposes thereof.

And also all improvements made or to be made to any or all of said railway, property, or estate by the said party of the first part or by others, and also all and every other estate, right, title, interest, property, or thing, — right, privilege, or franchises which the said party of the first part now owns or holds or which it may hereafter acquire or hold as necessary or convenient for the use, occupation, and enjoyment of said railway, rights, privileges, and franchises or any part or portion thereof.

And also all estate, right, title, and interest which the said railway company now has or may hereafter acquire of, in, or to the railway bridge across the Ohio river at Point Pleasant, in the State of West Virginia, and the railway and other property appurtenant thereto:

To have and to hold the premises, property, rights, and franchises and estates thereby conveyed or intended to be conveyed, with all and singular the reversions, remainders, tolls, rents, issues, profits, and appurtenances then or thereafter belonging or in anywise appertaining thereto, unto the said The Mercantile Trust Co. and its successors and assigns and their heirs forever, in trust, nevertheless, for the persons, corporations, firms, and partnerships, and for the benefit, security, and protection of the persons, corporations,
7 firms, and partnerships who should hold the bonds or interest coupons aforesaid or any or either of them, and for enforcing the payment thereof when payable, in accordance with the true intent and meaning of the stipulations of said deed of trust or mortgage, of said bonds and said interest coupons, and without any preference of any of said bonds over any of the others thereof by reason of priority in the time of the issue or negotiation thereof or otherwise howsoever."

Said conveyance being made subject, however, as to part of the said railroad, to the lien of certain mortgages, known as the Mineral Division mortgages, of the Ohio Central Railroad Company, therein described, it being herein provided, however, and the said deed of trust or mortgage was expressed to be upon the express condition that if the said The Kanawha and Ohio Railway Co., its successors or assigns, should well and truly pay or cause to be paid the principal and interest to become due on the said bonds to be issued thereunder, at the times and in the manner stipulated in said bonds and in said interest coupons, according to the true intent and meaning thereof, and should well and truly keep and perform all and singular the covenants, promises, and conditions in said bonds and in said deed of trust or mortgage expressed as to be kept, observed, and performed by or on the part of the said The Kanawha and Ohio Railway Co., then said mortgage or deed of trust and the estate and rights thereby granted should cease, determine, and be void; otherwise to be and remain in full force.

And the said Mercantile Trust Co. accepted the trust created by said mortgage.

A copy of said mortgage or deed of trust is hereto annexed and marked "Exhibit A" and made a part of this bill.

8 V. That said mortgage or deed of trust was thereafter duly recorded in each of the counties through or into which the said railroad ran or in which was situated any part of said mortgaged property, the same being filed for record and admitted to record in each of said counties prior to the 1st day of August, 1886.

VI. That said mortgage or deed of trust of the said The Kanawha and Ohio Railway Company contains a covenant as follows:

"The railway company hereby covenants, promises, and agrees to and with the trustee that it will forthwith deliver or cause to be delivered to the trustee bonds and stock of the Point Pleasant Bridge Company, representing, except as herein appears, the entire property in the railway bridge at Point Pleasant and the railway and other property appurtenant thereto not conveyed by these presents, which bonds and stock are delivered to and are to be held by the trustee as security for the equal payment, without preference, of the bonds to be issued as aforesaid in accordance with the true intent and meaning of the stipulations of this deed and of said bonds and interest coupons."

That the said railway bridge at Point Pleasant and its approaches is used as part of the line of road of the said The Kanawha and Ohio Railway Co., connecting its railroad in West Virginia with its railroad in Ohio; that said bridge was at the date of the mortgage or deed of trust aforesaid subject to the lien of a certain mortgage or deed of trust made by Erwin Davis and wife and John W. Simpson, of the first part, to Alexander M. White, William Augustus White,

9 and Alfred T. White, of the second part, dated October 31, 1885, to secure the payment of two hundred thousand dollars and interest, but that this mortgage has since been paid and the lien thereof discharged.

That, in accordance with the covenant above recited and contained in said mortgage or deed of trust of the Kanawha and Ohio Railway Co., bonds of the said Point Pleasant Bridge Company for the principal sum in the aggregate of one million dollars, secured by mortgage of said bridge Co. to John W. Simpson, as trustee, and stock of said bridge Co. of the par value of nine hundred and ninety-eight thousand dollars, being all of its stock except two thousand dollars in par value thereof, and said bonds and stock representing, except for the said two thousand dollars of stock and the mortgage to said Alexander M. White and others, since paid and discharged, the entire property in said railway bridge and the railway and other property appurtenant thereto, were on or about the 2nd day of July, 1886, delivered to the complainant by Erwin Davis and John W. Simpson, to be held in accordance with said covenant and to be held and dealt with in accordance with a certain written agreement of that date, a copy of which is hereto attached and marked Exhibit B and made part of this bill, and said bonds and stock are still held by the complainant for such purpose.

VII. That of said bonds of the Kanawha and Ohio Railway Co. there have been duly issued for value and in accordance with the provisions of said mortgage and are now outstanding eleven hundred and sixty bonds for the principal sum in the aggregate of eleven hundred and sixty thousand dollars, besides which there are reserved by the trustee, this complainant, and withheld from issue in its custody and possession (except for the purpose of paying or retiring the bonds secured by said Mineral Division mort-
10 gages) one hundred and eleven of said bonds for the principal sum in the aggregate of one hundred and eleven thousand dollars.

VIII. That the issue of bonds and the execution and delivery of said mortgage or deed of trust by said Kanawha and Ohio Railway Co. for securing the payment thereof had before said execution and delivery been duly authorized and assented to by all the stockholders of the said The Kanawha and Ohio Railway Company and by the board of directors thereof.

IX. That on the 1st day of January, 1889, there became due and payable upon the said bonds of the Kanawha and Ohio Railway Co. a semi-annual installment of interest, evidenced by the interest warrants or coupons attached to said bonds, due on said last-mentioned date; that since said first day of January, 1889, divers of said interest warrants or coupons due on that day have been presented at the office or agency of the said The Kanawha and Ohio Railway Co. in the city of New York, and payment thereof has been demanded and refused by said company, and said company has in this respect made default, and such default still continues, and the said The Kanawha and Ohio Railway Company has thus failed to pay interest on some of said bonds according to the stipulations of said bonds and the conditions and covenants of said mortgage or deed of trust and is in default in respect to said stipulations, conditions, and covenants.

And your orator further shows unto your honors that the said defendant railway Co. has a large floating debt, amounting to about $350,000, and that the said railway company is insolvent and unable to pay its floating debt and current and presently accruing indebtedness, and that suits and actions are threatened by the
11 creditors of said corporation, and that there is great danger that the property of the defendant covered by the said indenture of mortgage or deed of trust or some part of it may be seized and attached under process issued before or after judgment in said threatened suits, and that the property of the said defendant may thereby be separated, dissipated, and broken up and the value thereof destroyed or greatly impaired by the contest of creditors having conflicting claims.

That your orator is informed and has reason to believe that there are now due and unpaid considerable sums of money for taxes which have been levied and assessed upon the property of said defendant by municipal and State authorities having authority to levy and assess such taxes, which amounts the said defendant is unable to pay, and that there is danger that some portion at least of

the property of said railway company covered by said mortgage will be presently advertised and sold to meet the payment of such taxes so levied and assessed and in default.

That, as your orator is informed and has reason to believe, there is now due and will presently become due large amounts on account of labor, wages, and current expenses of said defendant, which said defendant is wholly unable to pay, and, as your orator is informed and believes, that the said mortgage- property is insufficient and inadequate security for the payment of the outstanding bonds secured by said indenture of mortgage or deed of trust.

That, as your orator is informed and has reason to believe, there is now due and will presently become due large amounts on account of labor, wages, and current expenses of said defendant, which said defendant is wholly unable to pay, and, as your orator is informed and believes, that *that* the said mortgaged property is insuf-
12 ficient and inadequate security for the payment of the outstanding bonds secured by said indenture of mortgage or deed of trust.

And your orator further shows unto your honors that no proceedings at law have been had nor any action or suit commenced by or on behalf of your orator or any holder of the bonds of said company secured by the mortgage aforesaid for any principal or interest unpaid or accrued thereon except *onlt* this action.

In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law and is only relievable in a court of equity, where matters of this kind are properly recognizable and relievable—

Your orator therefore prays the aid of this hon. court, and that the said indenture of mortgage or deed of trust may be decreed to be a lien upon all property, real, personal, or mixed, rights, franchi-es, lands, titles, railroads of the Kanawha and Ohio Railway Co. described in said mortgage or deed of trust, and that the said Kanawha and Ohio Railway Co. may be decreed to pay unto your orator for the bondholders under aforesaid mortgage or deed of trust all arrears of interest now due or that may hereafter become due and payable upon said bonds, together with all costs and expenses in this behalf incurred and expended; and in default thereof that the said defendant above named and all persons claiming under it or under said mortgagor may be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to the said mortgaged premises and every part and parcel thereof, and that all and singular the said mortgaged premises, with the appurtenances, property and effects, rights, immunities, and franchises in the said mortgage mentioned may be sold as an
13 entirety under a decree of this honorable court, and that at the same time and with said mortgaged property and franchises be sold them bonds and stock of the said Point Pleasant Bridge Company now held by your orator as aforesaid, and that out of the moneys arising from the sale thereof, after deducting from the proceeds of any such sales just allowances for all disbursements and expenses of the said sale, including attorney's and counsel fees

and the reasonable charges of your orator for services rendered as trustee and for all expenses incurred by it in the premises and all payments which may be made for taxes or assessments on the said premises or any part thereof, the said proceeds be applied to the payment of such moneys due on the aforesaid bonds and coupons as may be at that time unpaid.

And your orator further prays that a receiver be forthwith appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of all property, equitable interests, things in action, effects, money, receipts and earnings, rights, privileges, franchises, and immunities of the said railway Co. and of all other property included in and covered by the said mortgage, and that the defendant be decreed to make such transfer or conveyance to such receiver and to the purchasers of said property at any sale as aforesaid as may be necessary and proper to put them or either of them in possession and control of said property.

And your orator further prays that a writ of injunction issue out of and under the seal of this honorable court, or issued by one of your honors, according to the practice of this court in such case, directing, commanding, enjoining, and restraining the said defendant and all other persons and each and every one of them
14 from interfering with, transferring, selling, or dis- of any of -he property mentioned in and covered by the said mortgage, or from taking possession of, levying upon, or attempting to sell, either by judicial process or otherwise, any portion of the property embraced in or covered by the said mortgage, and that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require and to this honorable court shall seem meet.

And may it please your honors to grant unto your orator a subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the Kanawha and Ohio Railway Company, therein and thereby commanding it, on a day certain therein to be named and under a certain penalty, to be and appear before this honorable court, then and there to answer (but not under oath, such oath being expressly waived) all and singular the premises, and to stand to, perform, and abide by such order, direction, and decree as may be made against it in the premises as shall seem meet and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, &c.

THE MERCANTILE TRUST COMPANY,
By ALEXANDER & GREEN.
SIMPSON, THACHER & BARNUM,
Solicitors for Complainants.

WILLIAM W. GREEN,
THOMAS THACHER,
Of Counsel.

15 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

H. C. Dening, being duly sworn, says that he is the secretary of The Mercantile Trust Co., the complainant in the foregoing bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations therein contained as far as they relate to his own acts are true, and as far as they relate to the acts of others he believes it to be true.

That in regard to all matters and things in the foregoing bill of complaint alleged which are not within the personal knowledge of this deponent the deponent has been fully informed and he believes that the same are true.

H. C. DENNING.

Sworn to before me this 16th day of February, 1889.

GEO. V. TURNER,
[SEAL.] *Notary Public, N. Y. Co., No. 9.*

16 EXHIBIT A.

This indenture, made this first day of May in the year one thousand eight hundred and eighty-six, between the Kanawha and Ohio Railway Company, a corporation duly created and existing under and by virtue of the laws of the States of Ohio and West Virginia, herein called the railway company, party of the first part, and the Mercantile Trust Company, a corporation duly created and existing under and by virtue of the laws of the State of New York, trustee, herein called the trustee, party of the second part.

Whereas, the railway company is a corporation, formed by the consolidation of the Kanawha and Ohio Railway Company, a corporation of the State of West Virginia, with the Ohio and Kanawha Railway Company, a corporation of the State of Ohio, under and pursuant to a joint agreement of consolidation by and between the said companies duly entered into, under the corporate seals thereof, by the directors thereof, and ratified, approved and assented to by all the stockholders of said two companies; and

Whereas, by virtue of such consolidation the railway company has become vested -ith the title to all the rights, privileges, franchises and property, and has assumed and become bound by all the covenants, obligations and promises of each of the corporations so consolidating as aforesaid, and whereas the railway Co. was thus formed in pursuance of and in order to carry into effect a certain agreement for the reorganization of the River division of the
17 Ohio Central Railroad Company, dated the 7th day of March, A. D. 1885, and made by and between the holders of River Division first-mortgage bonds of the said The Ohio Central Railroad Co., of the first part, and Erwin Davis and others, constituting a committee of reorganization, of the second part; and

Whereas, the railway Co, for the purpose of carrying into effect the said joint agreement of consolidation, and discharging and per-

forming the covenants, obligations and promises of the consolidating corporations, parties thereto, and for the purpose of constructing, completing, extending, furnishing and equipping its railroad and for the purpose of acquiring the property and materials necessary therefor, and for other lawful purposes, and in pursuance of the provisions of said agreement of reorganization, has deemed it necessary to borrow money and to issue its bonds therefor, and to create a mortgage to secure the payment thereof; and

Whereas, to that end, the board of directors of the railway company has duly directed the issue of a series of not exceeding eighteen hundred bonds for the principal sum of one thousand dollars each, to become due January 1st, A. D. 1936, and to bear interest at the rate of six per cent. per annum, and to be signed by its president or vice-president, sealed with its corporate seal, attested by its secretary and duly authenticated by the certificate of the trustee hereunder, and having interest coupons thereto attached, with the name of its treasurer engraved thereon, which bonds, coupons and certificate are to be in the forms following respectively:

UNITED STATES OF AMERICA, *States of Ohio and West Virginia.*

The Kanawha and Ohio Railway Company.

First-Mortgage Six Per Cent. Gold Bond.

18 $1,000. No. —.

For value received, the Kanawha and Ohio Railway Company promises to pay to bearer or in case this bond be registered, to the registered owner hereof, one thousand dollars in gold coin, of the United States of the present standard of weight and fineness at the office or agency of said company, in the city of New York, on the first day of January, in the year one thousand nine hundred and thirty-six, and, on presentation and surrender of the annexed coupons as they shall severally become due, to pay interest thereon at the rate of six per cent. per annum, from the first day of July one thousand eight hundred and eighty-six, until such principal sum shall be paid, such interest being payable in like coin at said office or agency on the first days of January and July in each year.

This bond is one of a series of eighteen hundred bonds of like tenor and amount numbered consecutively from 1 to 1800 which are to be issued to no greater amount than at the rate of ten bonds (for the principal sum in the aggregate of ten thousand dollars) for each mile of railroad actually constructed or acquired by and belonging to said railway company, and which are equally secured to be paid by a mortgage or deed of trust dated the first day of May A. D. 1886, made by *by* the said railway Co. to the Mercantile Trust Co. of New York, as trustee and conveying, upon the terms and conditions therein set forth, the franchises, railroad, equipment and appurtenant property of said railway Co. situated in the States of Ohio and West Virginia including its interest in the Point Pleasant railway bridge or securities representing the same.

19 If default shall be made in the payment of any half-yearly instalment of interest on any such bond, the principal hereof may be made due, and payable as provided in said mortgage or deed of trust.

This bond is issued upon the express condition, to which each successive holder hereof assents by receiving the same, that no stockholder of the said railway company shall be held personally liable to pay any part of the principal or interest hereof by virtue of any law now in force or hereafter enacted, such liability of stockholders being waived.

This bond may be registered in the owner's name on the books of the company, and after such registration no transfer hereof, unless made on the books of the company by the registered owner and noted hereon by the company's transfer agent, shall be valid unless the last transfer shall have been to bearer, in which case this bond shall again become transferable by delivery until again registered in the name of the owner. Registration of this bond shall not restrain negotiability of the interest coupons by delivery merely.

This bond shall not be valid until the certificate endorsed hereon shall have been signed by the trustee under the said mortgage or deed of trust.

In witness whereof the said railway company has caused to be af-ixed hereto its corporate seal, attested by its secretary, and these presents to be signed by its president this first day of May, A. D. one thousand eight hundred and eighty-six, and has hereto attached coupons with the name of its treasurer engraved thereon.

THE KANAWHA AND OHIO RAILWAY CO.,

20 By —— ——, *President.*

Attest: —— ——, *Secretary.*

Form of Coupon.

On the first day of ——, 18—, the Kanawha and Ohio Railway Company will pay to bearer thirty dollars in gold coin of the United States of America, at its office or agency, in the city of New York, being six months' interest then due upon its first-mortgage bond No. —.

—— ——, *Treasurer.*

Trustee's Certificate.

This bond is one of a series of bonds within mentioned and also described in a mortgage or deed of trust bearing date the first day of May, 1886, and executed by the Kanawha and Ohio Railway Company to the Mercantile Trust Company, New York, trustee.

THE MERCANTILE TRUST COMPANY,

By —— ——, *President.*

21 And whereas, the issue of said bonds and the execution and delivery of this mortgage or deed of trust for securing the payment thereof, have been duly authorized and assented to by

all the stockholders of the railway company and by the board of directors thereof:

Now, therefore, this indenture, witnesseth:

That, the Kanawha & Ohio Railway Company, party of the first part, for and in consideration of the premises, and the sum of one dollar to it duly paid by the said party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged and in order to secure the payment of the principal and interest of the bonds aforesaid, at any time outstanding, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, assigned, transferred and set over, and by these presents doth grant, bargain, sell alien premise, release, convey and confirm, assign, grant, transfer and set over unto the said party hereto of the second part, and its successors and assigns and their heirs forever, all and singular the railroad of the said The Kanawha and Ohio Railway Co., extending from a point in the village of Corning in the township of Monroe in the county of Perry, in the State of Ohio, through the counties of Perry and Athens by way of Jacksonville to a point within or near South Shawnee, in said county of Perry, and through or into the counties of Perry, Athens, Meigs and Gallia, by way of Athens and Middleport to a point on the Ohio river, opposite the village of Point Pleasant, in the State of West Virginia and thence across the Ohio river, and through the counties of Mason, Putnam, Kanawha and Fayette, by way of Charleston, and, in general
22 along or near the northeasterly bank of the Kanawha river, to a point at or near the mouth of Gauley river, in said county of Fayette, in said State of West Virginia, constructed or to be constructed and as the same is now or may hereafter be located and whether now acquired or to be hereafter acquired; including all and singular the railroad, lands, and other property which were conveyed to the said The Ohio and Kanawha Railway Company, by Erwin Davis and Emily B., his wife, Albert Gallup and Edward C. Homans and Francis E., his wife, by deed dated the 29th day of January in the year one thousand eight hundred and eighty-six, and including also, all and singular the railroad lands, and other property (except the coal lands and mineral rights in Raleigh county), which were conveyed to the said The Kanawha and Ohio Railway Company, a corporation of the State of West Virginia by the said Erwin Davis and Emily B., his wife, Albert Gallup and Edward C. Homans and Francis E., his wife, by deed dated the 29th day of January one thousand eight hundred and eighty-six.

And also, all and singular the lands, tenements and hereditaments rights of way and easements and all other interests in land, including lands held or acquired for the purposes of depots stations, terminals or ferries now held or hereafter acquired by said railway company, in connection with said railroad or for the uses thereof.

And also, all letters patents, grants of land, and of land under water and of water rights and all leaseholds, leases, terms and parts of terms, rights under leases or contracts, covenants or agreements

and all rights of trackage, terminal, bridge and ferry rights, privileges and franchises and all licenses, permits and privileges
23 from the Government of the United States, or from the *from the* State of Ohio or the State of West Virginia, or by any governmental or municipal authority and all other rights or privileges, general or special, now held or hereafter acquired by said railway company, for the purposes of said railroad or any part thereof.

And also, all railways, tracks, sidings, spurs, turnouts bridges, station-houses, depots, freight-houses, warehouses, elevators, roundhouses, car-houses, storehouses, turn-tables, water tanks, machine shops and repair shops, and other structures, buildings, erections and fixtures of every kind and nature whatsoever, now held or which may hereafter be acquired by the said railway Co. for the uses and purposes of the said railway or in connection therewith or in the business thereof.

And also, all locomotives, engines, cars, and other rolling stock and railway equipment and all ferry-boats steamboats tug-boats, floats, barges and other floating equipment and all tools, rails, ties machinery, implements, fuel and materials, now held or which may hereafter be acquired for the uses or purposes of the said railway, or in connection therewith or the business thereof.

And also, all other property, real, personal or mixed, now held or which may hereafter be acquired for the purposes of the said railway, or for the use thereof or in connection therewith or the business thereof, or for or in connection with the construction, operation, or maintenance, reparation or replacement of the said railway, or any part thereof or as convenient or necessary for the uses or purposes thereof.

And also, all rights, powers, privileges and franchises connected with or relating to the said railway, and other property
24 including the right to operate and maintain the said railway and other property, whether now held or hereafter acquired by the said railway company and connected with or relating to the said railway or for the uses or purposes thereof.

And also, all improvements made, or to be made, to any or all of said railway, property or estate by the said party of the said part or by others, and also, all and every other estate, right, title, interest, property or thing, right, privilege, or franchises which the said party of the first part now owns or holds or which it may hereafter acquire or hold as necessary or convenient for the use, occupation and enjoyment of said railway, rights, privileges and franchises or any part or portion thereof.

And also, all estate right, title and interest which the said railway company now has or may hereafter acquire, of, in or to the railway bridge across the Ohio river, at Point Pleasant in the State of West Virginia, and the railway and other property appurtenant thereto.

To have and to hold, the premises, property, rights, franchises and estates hereby conveyed or intended to be conveyed with all and singular the reversions, remainders, tolls, rents issues, and profits, privileges and appurtenances now or hereafter belonging or

in anywise appertaining thereto, unto the said party of the second part, and its successors and assigns and their heirs forever, in trust, nevertheless, for the persons and corporations firms, and partnerships and for the benefit, security and protection of the persons and corporations, firms and partnerships, who shall hold bonds and intere-t coupons aforesaid or any or either of them, and for the enforcing the payment thereof, when *pay-*
25 *thereof when* payable in accordance with the true intent and meaning of the stipulations of this deed and of said bonds and of said interest coupons, and without preference of any of said bonds over any of the others thereof by reason of propriety in the time of the issue or negotiation thereof or otherwise howsoever. Subject, nevertheless, as to that part of the said railroad formerly known as the Mineral division of the Ohio Central railroad, extending from a point in the said village of Corning, through and into the counties of Perry and Athens to a point within or near South Shawnee to the lien of the mortgages known as the Mineral Division mortgage of the Ohio Central Railroad Co., being a mortgage or deed of trust made by the Ohio Central Raiload Co. to the Central Trust Co. of New York, under date of January 1, 1881, to secure three hundred coupon bonds for the principal sum of one thousand dollars each with interest at the rate of six per cent. per annum, of which bonds only one hundred and seven, for the principal sum, in the aggregate of one hundred and seven thousand dollars now remain outstanding; and a mortgage or deed of trust made by the said railroad company to the said truste company, under date of January 1st, 1881, to secure three hundred income bonds for the principal sum of one thousand dollars each, of which bonds four thousand dollars now remain outstanding. Provided, however, and these presents are upon the express condition, that if the party of the first part, its successors or assigns, shall well and truly pay, or cause to be paid, the principal and interest to become due on the said bonds to be issues as aforesaid, at the times and in the manner stipulated in said bonds and in said interest coupons, according to the true intent and meaning thereof, and shall well and truly keep, perform and
26 observe all and singular the covenants, promises and con*con*-itions in s-id bonds and in this indenture expressed as to be kept, performed and observed by or on the part of the railway Co., then these presents and the estate and rights hereby granted shall cease, determine and be void; otherwise to be and remain in full force.

The railway company hereby covenants, promises and agrees to and with the trustee, that it will forthwith deliver, or caused to be delivered to the trustee, bonds and stock of the Point Pleasant Bridge Company, representing, except as herein appears the entire property in the railway bridge at Point Pleasant thereto, not conveyed by these presents, which bonds and stock are delivered to and are to be held by, the trustee as security for the equal payment without preference of the bonds to be issued as aforesaid, in accordance with the true intent and meanng of the stipulations of this deed, and of said bonds and interest coupons.

It is hereby covenanted and agreed, by and between the parties hereto, and the party of the first part hereby covenants, promises and agrees to and with the persons and corporations who may become the holders of said bonds, and each of them, that, except as hereinafter provided, the total issue of said bonds hereby secured shall be limited to ten bonds of one thousand dollars each (for the principal sum in the aggregate of ten thousand dollars) for each mile of main track of railroad not including switches, turnouts or sidings, actually constructed by or for the party of the first part, and conveyed by these presents or intended to be, and at *at* that rate for parts or fractions of a mile, and that the said bonds shall not be certified and delivered by the said trustee at a greater rate than at the said rate of ten bonds, for
27 the principal sum of ten thousand dollars for each mile of such railroad actually constructed that is to say: In respect to that part of the railroad of the railway company already constructed and hereby conveyed or intended to be, including therein the railway bridge at Point Pleasant or securities representing the same, the trustee shall, from time to time, certify and deliver said bonds as ordered or directed by the railway company, but to no greater amount than at the said rate of ten bonds for each mile of main track of such railroad and in respect to that part of the railroad of the railway company to be hereafter constructed *the railway company to be hereafter constructed* the railway Co. may issue and the trustee shall certify and deliver said bonds as ordered or directed by the railway company, but to no greater amount than at the said rate of ten bonds for each mile of main track of railroad actually constructed as and when each section of five miles or more shall be completed; but, nevertheless, during the work of construction the railway company may, from time to time, sell and issue, and in such case the said trustee shall certify and deliver said bonds in advance thereof, but never at a greater rate than at the rate of ten bonds for each mile of main track of railroad being, or about to be, constructed, provided that in any such case the said trustee shall receive the proceeds of the sale of the bonds so sold, certified and delivered to be held by it in lieu of the bonds themselves, and to be paid out only in the event or contingency which would warrant the issue, certification and delivery of the bonds as herein provided, namely, the completion of a section of five miles or more of said railroad that is to say, upon the completion of any section of at least five miles of the said railroad the said trustee shall certify
28 and deliver bonds, at the rate of ten bonds for each mile of main track of railroad, *the said trustee shall certify and deliver bonds at the rate of ten bonds for each mile of main track of railroad*, not including switches, turnouts or sidings, and at the same rate for parts in fractions of a mile, or, in case the bonds have been sold, shall pay over the proceeds of the sale thereof to the railway company shall be sufficient evidence to the trustee of the number of miles of railroad now constructed and belonging to the railway company and of the completion of any section or sections of said railroad hereafter constructed and in either case, shall fully

protect the payment of the proceeds of the sale thereof upon the proper order or direction of the railway company.

And it is hereby covenanted and agreed by and between the parties hereto, and the railway company hereby covenants, promises and agrees to and with the persons, firms or copartnerships and corporations, which shall become the holders of the bonds hereby secured, that, until the lien of the Mineral Division mortgages of the Ohio Central Railroad Company, hereinbefore reserved by the trustee, and withheld from issue in the custody and possession (except for the purpose of paying or retiring the bonds secured by the said Mineral Divisions mortgages) so many of the bonds hereby secured and which in accordance with the terms hereof, the railway company may be entitled to issue in respect to the railroad already constructed, as from time to time there shall be Mineral Division bonds of the Ohio Central Railroad Company outstanding and that, until the lien of the mortgage or deed of trust upon the Point Pleasant bridge, and appurtenant property, dated the 13*st* day of October A. D. 1885 and made by Erwin Davis and wife and
29 John *and John* W. Simpson of the first part, to Alexander M. White, William Augustus White and Alfred T. White, of the second part to secure the payment of two hundred thousand dollars and interest shall have been duly discharged and released, there shall be reserved by the trustee and withheld from issue, in its custody and possession, except for the purpose of paying or discharging the said mortgage or deed of trust, two hundred of the bonds hereby secured for the principal sum in the aggregate of two hundred thousand dollars and which in accordance with the terms hereof, the railway company may be entitled to issue in respect to the railroad already constructed as hereinbefore provided.

Whenever any of the said Mineral Division bonds of the Ohio Central Railroad Company, now outstanding, shall be paid or retired they shall be cancelled and, thereupon, the trustee shall certify and deliver to the railway company an equal number of the bonds hereby secured and reserved as aforesaid.

And it is hereby covenanted and agreed by and between the parties hereto, and the railway company hereby covenants, promises and agrees to and with the persons, firms or corporations which shall become the holders of the bonds hereby secured, that the bonds secured hereby, or intended to be, and the proceeds thereof, may be used for the following purposes and none others to wit:

Carrying into effect the provisions of the joint agreement of consolidation hereinbefore referred to; discharging and performing the covenants, obligations and promises of each of the consolidated companies, parties to said agreement; completing, extend- furnishing and equipping its railroad, and acquiring the prop-
30 erty and materials necessary therefor; paying and discharging the mortgages hereinbefore referred to; and any other lien or claim which has been, or may be adjudged to be, prior and superior to the lien of these presents and for any other lawful purpose.

It is hereby covenanted, declared and agreed, by and between the parties hereto, and the railway company, for itself, its successors

and assigns, doth hereby covenant and agree to and with the respective persons and corporations, firms and partnerships, who shall hold the bonds and interest coupons aforesaid, or any or either of them, that the further trusts, uses, purposes, conditions and covenants for and upon which the rights, franchises and property, real and personal hereinbefore described or enumerated are conveyed to, and are to be held and disposed of by the trustee are as follows, that is to say:

First. This deed shall not operate nor be held to prohibit the railway company, its successors and assigns, so long as it or they shall remain in possession of the said mortgaged premises, and there shall be no existing default in the payment of the principal or interest of the bonds hereby secured or of some of them, or in respect to something hereby required to be done, observed, kept or performed by the railway company, from selling and conveying or exchanging free from the encumbrances and trusts hereof, any property real or personal, now held or hereafter acquired by the railway company, which shall no longer be either useful or necessary in the proper and judicious management or maintenance of the railroad and property hereby conveyed or the business thereof; but in no case shall any sale or other disposition of such property be made without the express assent in writing of the trustee.

31 And the trustee, and its successors and assigns, are respectively expressly authorized to release under seal, from the operation and effect of this deed any property so sold or exchanged for other property, viz: any premises acquired as grounds for depots or other buildings, and which shall have ceased, at the time of such release, to be required for the same or for any other purposes of the railway company, any premises provided as right of way which at the time of such release by reason of any change in the railway company's route, shall have ceased to be required for right of way or for any other purposes of the railway company; and any other real estate belonging to the railway company not forming part of the line of its railroad, and, at the time of such release, not used or required for the maintenance, operation or other purposes, of the said railroad and which shall be in good faith sold or exchanged by the railroad company. But the property taken in exchange, if such there be, shall immediately become and be subject to the lien hereof as if the same had been originally conveyed hereby; and the net proceeds of property released, if sold for cash, shall be expended in the purchase of other property required by the railway Co. which shall immediately become and be subject to the lien hereof, or in improving and bettering the railroad or other property hereby conveyed, or in lieu thereof, shall be paid over by the railway Co. to the trustee, to be applied by the trustee with all convenient speed to or towards the purchase, in open market, of one or more of the bonds hereby secured, and all bonds so purchased shall be immediately cancelled, and shall cease to be entitled to the benefit of the security hereby provided.

32 Second. Until default shall be made in the payment of the principal or interest of the bonds hereby secured or of some

of them, or in respect to something hereby required to be done, observed, kept or performed by the railway company it and its successors and assigns, shall be permitted to possess, manage, operate and enjoy the railway equipment, and other property, rights and franchises hereby conveyed or intended to be, and to receive and use the tolls, income, rents, issues and profits thereof.

Third. The railway Co., its successors and assigns shall and will pay all taxes and assessments lawfully, levied or assessed upon the railroad and other property and the franchises hereby conveyed or intended to be, or any part thereof, or upon any income therefrom, when the same shall become due and will not suffer any mechanics' laborers' statutory or other lien to be created upon any part of the property hereby conveyed, or intended to be, the lien of which might or could be held to be prior to the lien of these presents, and will not suffer any matter or thing whatsoever whereby the lien hereof might or could be impaired.

Fourth. As the interest coupons attached to the bonds secured hereby mature and are paid by the railway company they shall be cancelled and no purchase or sale of any of the said coupons nor advance or loan upon the same, and no redemption of any of said coupons, by any person or corporation in behalf of the said railway Co. or by any corporation, person, or persons, who may guarantee the payment of said coupons, shall operate to keep any of said coupons alive or in force as a lien upon the railroad and other property and the franchises hereby conveyed or intended to
33 be, or any part thereof.

Fifth. In case default shall be made in the payment of any of the interest hereby secured to be paid, and such default shall continue for one year after payment shall have been duly demanded, then and thereupon the principal of any bond hereby secured to be paid, the interest upon which shall be in default as aforesaid shall, at the option of the holder of such bond, become immediately due and payable, anything in said bond or herein to the contrary notwithstanding; and, in case of such default continued for one year as aforesaid, if requested to do so by one-fourth in interest of the holders of the bonds, hereby secured and then outstanding, by an instrument or concurrent instruments in writing, signed and proved as hereinafter provided, it shall be the duty of, and it is hereby made obligatory upon, the trustee to elect to declare immediately due and payable the entire principal sum hereby secured to be paid, and the same shall, thereupon, become and be immediately due and payable.

Sixth. In case default shall be made in the payment of any money, principal or interest, hereby secured to be paid and such default shall continue for one year after payment shall have been duly demanded, the railway company, upon demand of the trustee, shall forthwith surrender to the trustee the actual possession of, and it shall be lawful for the trustee, upon being requested so to do by one-fourth in interest of the holders of the bonds, hereby secured and then outstanding by an instrument or concurrent instruments in writing, signed and proved as hereinafter provided, forthwith to

enter into and upon, and take possession of, personally or by
34 its agents or attorneys, all and singular the *the* railways, property and equipment thereof, and the appurtenances thereto and all the mortgaged premises hereby conveyed or intended to *ge*, together with all the records, books papers and accounts of the railway company and to have, hold and use, operate and manage the same, and from time to time make all needful repairs and such alterations therein and additions and improvements thereto, as to it shall seem wise and as the net income coming to its hands shall be adequate to pay for; and to receive the tolls rents, incomes, issues and profits thereof, and out of the said rents, tolls, incomes, issues and profits to pay all the proper costs, charges and expenses of so taking, holding and managing the same, including a reasonable compensation to the trustee, its agents, attorney and counsel, and all taxes and assessments and other charges prior to the lien of these presents, and all expenses of such repairs, alterations, additions and improvements, and to apply the remainder of the moneys so received by it as follows: In case the principal monies secured by such bonds shall not have become due, to the payment of the coupons remaining in default in the order of their maturity; in case the said principal monies shall have become due to the payment of the principal and accrued interest upon such bonds *pro rata* without any preference or priority whatever, except that the accrued interest shall first be paid in the order of maturity of the coupons representing the same.

Seventh. In case default shall be made in the payment of any money principal or interest hereby secured to be paid and such default shall continue for one year after payment shall have been duly demanded, it shall be lawful for the trustee upon being
35 *upon being* requested so to do by one-fourth the interest of the holder- of the bonds thereby secured and then outstanding by an instrument or concurrent instruments in writing, signed and proved as hereinafter provided, with or without entry to sell all the lands, railways, premises, estate, property rights and franchises hereby conveyed at public auction at some suitable place in the city of Charleston, West Virginia or in the city of Columbus, Ohio having first given such notice of said sale as is required by law and also a notice by publication in at least one newspaper published in the city of New York and one published in the said city of Charleston, and one published in the said city of Columbus at least once a week for three months next preceding said sale, and from time to time to adjourn such sale or sales in its discretion, and upon such sale or sales to make and deliver to the purchaser or purchasers of the premises estate property, rights and franchises so sold a good and sufficient deed or deeds for the same which sale or sales shall be a perpetual bar both in law and in equity against the party hereto of the first part and all persons and corporations lawful- claiming or to claim by, through or under it; and upon the making of any such sale the principal of all the bonds which may have been issued and shall then be outstanding hereunder shall forthwith become due and payable, anything in said bonds to the

contrary notwithstanding and upon the making of any such sale the trustee shall apply the proceeds of such sale or sales as
36 follows, to wit:

First, to the payment of the cost and expenses of such sale or sales including a reasonable compensation to the trustee, its agents, attorneys and counsel, and all expenses, liabilities and advances made and incurred by the trustees in the administration of the trust hereby created, and in operating and maintaining a railway hereby conveyed or intended to be, and all taxes and assessments prior to the lien of these presents; second, the payment of the whole amount of principal and interest which shall then be owing or unpaid upon the said bonds, or any of them, whether the said principal by the tenor of said bonds be then due or yet to become due; and in case of a deficiency of such proceeds to pay in full the whole amount of principal and interest owing or unpaid upon said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, and without preference of any one bond or interest coupons over any of the others, except that the accrued interest shall first be paid in the order of the maturity of the coupons representing the same; third, to pay over the surplus if any, to whosoever may be lawfully entitled to receive the same by the judgment of some court of competent jurisdiction.

The receipt of the trustee who shall make the sale, hereinbefore authorized, shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and such purchaser or purchasers, his or their assigns, or personal representatives, shall not, after paying such purchase-money and receiving such receipt of the trustee therefore, be obliged to see to the appli-
cation of such purchase-money upon or for the trusts or pur-
37 poses of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase-money by the trustee.

Eighth. If default shall be made in the payment of any money, principal or interest, hereby secured or in the performance of any covenant of the railway company herein contained and such default shall continue for six months after payment or performance shall have been duly demanded, it shall be the duty of and is hereby made obligatory upon the trustee, upon being required to do so, by one-fourth in interest of the holders of the bonds hereby secured and then outstanding, by an instrument or concurrent instrument in writing, signed and proved as hereinafter provided, forthwith to proceed to enforce the rights of the trustee and of the bondholders hereunder, in the proper courts or court by proceedings to foreclose the lien hereof or by other appropriate proceedings or both, as directed by the bondholders making such requisition, or in the absence of such directions, as counsel learned in the law may advise of most expedient in the interest of the bondholders.

Ninth. If default shall be made in the payment of any money, principal or interest, hereby secured or in the performance of any

other covenant of the railway company herein contained, and such default shall continue for one year after payment or performance shall have been duly demanded, it shall be the duty of, and it is hereby made obligatory upon, the trustee, upon being required so to do by an instrument or concurrent instruments in writing, signed and proved as hereinafter provided by the holder or holders of any of the bonds hereby secured to be paid and then outstanding, the principal of which shall at the time of such
38 requisition be due and unpaid, and the payment of which shall have been duly demanded or upon which any instalment of interest shall at the time of such requisition be due and unpaid, and the payment of which shall have been duly demanded, to proceed forthwith to enforce the rights of the trustee and of the bondholders under this deed or mortgage, in the proper court or courts their proceedings to foreclose the lien hereof, or by other appropria-e proceedings or both, as directed by the bondholders making such requisition, or in the a-sence of such direction as counsel learned in the law sha!l advise as most expedient in the interest of the bondholders.

And it is hereby covenanted, and agreed by and between the parties hereto that the rights to take proceedings for the foreclosure of the lien of this deed or mortgage, or otherwise to enforce the security intended to be given by these presence, is vested exclusively in the trustee hereunder until the said trustee shall have refused to proceed upon requisition of one-fourth in interest of the bondholders as provided in subdivision eight hereof, or shall have refused to proceed upon requisition of one or more holders of bonds as provided in subdivision ninth hereof.

Tenth. In case of any default on its part as aforesaid the railway company shall not and will not set up claim or seek to take advantage of any appraisement, valuation, stay, extension or redemption laws now existing or which may hereafter be enacted in the State of West Virginia or in the State of Ohio, in order to prevent or hinder the enforcement or foreclosure of this mortgage or
39 the absolute sale of the premises, estate property, rights or franchises, hereby conveyed, or the final and absolute putting into possession thereof immediately after such sale, of the purchaser or purchasers thereat, but hereby waives the benefit of all such laws.

Eleven. Upon the filing of the bill in equity or other commencement of judicial proceedings to enforce the rights of trustee and of the bondholders under these presents, the trustee shall be entitled to the appointment by any court, of competent jurisdiction, of a receiver or receivers of the property hereby mortgaged and of the earnings, income, rents, issues and profits thereof, pending such proceedings, with such power as the courts making such appointment shall confer.

Twelfth. In case of any sale under the provision hereof any purchaser at such sale shall be entitled, in making settlement for, or payment of the purchase-money bidden, to turn in toward the payment of such purchase-money any of the bonds and matured

and unpaid interest secured hereby, held by him, counting the principal and interest of such bonds for that purpose at the sum which shall be payable, out of the net proceeds of such sale to the holder thereof as his just share of such net proceeds, after allowing to the proportion of payment which may be required in cash for the cost and expenses of the sale; and if such share or net proceeds, shall be less than the amount then due upon such bonds to make such settlement by receipting on such bonds the amounts to be credited thereupon.

Thirteenth. The railway company for itself and all persons and corporations hereafter claiming through or under it, or who may at any time hereafter become holders of liens junior to that of these presents, hereby expressly waives and releases all right to have the estates comprised in the security intended to be created by these presents marshaled upon any foreclosure of the lien hereof; and any court in which the lien hereof shall be foreclosed, shall have the right to sell the entire mortgaged property together; and one-fourth in interest of said bondholders may, by an instrument or concurrent instruments in writing, signed and proved as herein provided, direct the trustee or petition the said court to sell the said property in such manner; and it is hereby covenanted and agreed that the personal property and chattels hereby conveyed or intended to be, shall be real estate for all the purposes of this instrument, and shall be held and taken to be fixtures and appurtenances of the said railway and as a part thereof, and are to be used and sold therewith, and not separate therefrom, except as hereinbefore provided.

Fourteenth. Any instrument in writing authorized by this deed or mortgage to be executed by the holders of the bonds secured hereby to be paid, may be in any number of parts and must be signed by the bondholders, parties thereto, or by their duly authorized attorneys. The execution thereof shall be deemed sufficiently proved if a notary public or other officer authorized to take the acknowledgement of deeds, shall certify under his official seal, that each signing the same, either as bondholders or attorneys has duly acknowledged the execution thereof to him, and made oath before him to the ownership of the said bonds by the persons claiming to hold the same. In like manner the execution of each power of attorney, under which any person shall claim to act for another in signing any such instrument shall be acknowledged before a notary public or other officer authorized to take the acknowledgement of deeds and certified under his official seal. But the trustee may, nevertheless, r-quire any person, claiming to be a bondholder, to produce his bonds, or give other evidence, satisfactory to the trustee, of the fact of his being such bondholder.

Fifteenth. The bonds hereby secured, or intended to be, are, and each of them, is issued upon the express condition, to which each successive holder of said bonds, or any of them expressly assents and agrees by receiving the same, that no stockholder of the railway company shall be held personally liable to pay any part of the principal o- interest of -id bonds or any of them, by virtue of any

law now en force or hereafter enacted, and each holder of any of said bonds by receiving the same expressly waives any right he may now or hereafter have, to proceed against the stockholders of the railway company for the payment of said bonds or any part thereof, and agrees to have recourse for such payment only against the railway company and the property thereof.

Sixteenth. The trustee may, and upon request of the railway company shall, cancel and discharge the lien of these presents, and execute and deliver to the railway company such deeds as shall be requisite to satisfy the lien hereof, and reconvey to the railway company the estate and title hereby conveyed or intended to be, whenever all the bonds and coupons secured hereby, which shall have been duly issued, shall be paid and canceled or destroyed; which cancellation or destruction shall take place in the pres-
42 ence of representatives duly appointed on behalf of the railway company and of the trustee, and upon receiving their certificate of the fact it will be the duty of the trustee to discharge said lien.

Seventeenth. It is hereby mutually covenanted and agreed between the parties hereto, that the party of the second part shall not be under any obligation to take any action towards the execution of this trust, which, in its opinion, will be likely to involve it in personal expense or liability, unless one or more of said bondholders shall as often as required by the trustee, give *give* it reasonable indemnity to its satisfaction against the same, anything herein to the contrary notwithstanding. And it is hereby further mutually covenanted and agreed by and between the part*w*es hereto, that the trustee may resign and discharge itself of the trust hereby created, by notice in writing to the party of the first part, to be given at least three months before such resignation shall take effect, or such shorter time as the railway company shall accept as adequate. And whenever a vacancy shall occur in the office of trustee hereunder by resignation or otherwise the board of directors of the railway company, or its successors or successor to fill such vacancy, which appointment shall be attested by the certificate in writing of the president and secretary of the party of the first part, under its corpora-e seal duly acknowledged, and be filed in the offices of the clerks or recorders of the counties in which the railway hereby conveyed is situated.

Notice of such appointment shall be given by publication in a newspaper published in said city of Charleston and one newspaper published in said city of Columbus, at least once a week for three months immediately thereafter; and the successor or succes-
43 sors appointed as aforesaid, shall continue to be the trustee or trustees hereunder, until a majority in interest of the holders of the bonds hereby secured, then outstanding, shall, by an instrument or concurrent instruments in writing, executed under their hands and seals, or the hands and seals of their attorneys-in-fact duly authorized for that purpose, and filed in the said offices, appoint a new trustee or trustees to act hereunder, in which case upon such filing of such instrument or instruments the trustee or

trustees thereby appointed shall, without any further act, deed or conveyance, become the trustee or trustees hereunder. And if said board of directors, shall for thirty days neglect or refuse to fill any such vacancy, the same may forthwith be filled by a majority in interest of the holders of the bonds hereby secured, then outstanding by filing as aforesaid the instrument or instruments of appointment hereinbefore specified. An appointment made in the manner hereinbefore prescribed by or in behalf of the majority in interest of the holders of the bonds hereby secured then outstanding, shall supersede any appointment to fill a vacancy theretofore made in any other manner whatsoever; and any trustee or trustees appointed to fill any such vacancy, or to succeed any trustee appointed to fill any such vacancy, or to succeed and trustee or trustees, hereunder, shall be vested with and entitled to all the rights, title, interest and estate, powers, duties and trusts herein conveyed and contained, as if originally named in this mortgage.

Eighteenth. The railway company, its successors and assigns, shall and will, on demand of the trustee, at any time make, do, execute, acknowledge and deliver all such further acts, deeds, and
44 assurances in the law as may be reasonably advised, devised or required for effectuating the intention of these presents and for the better assuring and confirming unto the trustee and its successors in the trust hereby created, upon the truste and for the purposes herein expressed, all and singular the railways, equipment and other property, appurtenances, rights, and franchises hereby conveyed, or intended so to be, whether now owned or possessed, or hereafter acquired by the railway company, its successors or assigns.

Nineteenth. The terms or words "trustee" or "said trustee" as used in these presents shall be held and construed to mean the trustee, party of the second part, or its success-r or successors for the time being, and said successor and successors shall have and be possessed of, and shall be competent to exercise all the estate, rights property and powers hereby granted to, or conferred upon, the party hereto of the second part.

Twentieth. In order to facilitate the record of this instrument, the same may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original, and such counterparts shall together constitute but one and the same instrument.

Twenty-first. The trustee shaol be entitled to reasonable compensation for all service in the execution of its trust hereunder.

In witness whereof, the party hereto of the first part has caused its corporate seal to be hereunto affixed, and attested by its secretary and these presents to be signed by its vice-president, and the party of the second part, in token of its acceptance of the trusts hereby created, has caused its corporate seal to be hereunto
45 affixed, attested by its secretary, and these presents to be

signed by its president the day and the year first above written.

THE KANAWHA AND OHIO RAILWAY COMPANY,
By JOHN W. SIMPSON,
Vice-president.

[SEAL.]

Attest: WM. M. BARNUM, *Secretary.*

Signed, sealed and delivered in the presence of—
PHILIP G. BARTLETT.
GEORGE HOFFMANN.

THE MERCANTILE TRUST COMPANY,
By LOUIS FITZGERALD, *President.*

[SEAL.]

Attest: H. C. DEMING, *Secretary.*

46 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this second day of July, in the year one thousand eight hundred and eighty-six, before me, the subscriber, a notary public in and for said city and county, personally came William M. Barnum, known to me to be the secretary of the Kanawha and Ohio Railway Company, the corporation described in and which executed the foregoing instrument, who, being by me duly sworn, did depose and say that he resides in the said city and county of New York; that he is the secretary of the said The Kanawha and Ohio Railway Company and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the corporate seal of the said company and was thereto affixed by order of the board of directors of the said company, and that he signed his name thereto by the like order as secretary of said company; and the deponent further said that he is acquainted with John W. Simpson and knows him to be the vice-president of said company; that the signature of the said John W. Simpson subscribed to the foregoing instrument is in the genuine handwriting of the said John W. Simpson and was thereto subscribed by the like order of the said board of directors and in the presence of said deponent.

In witness whereof I have hereunto set my hand and notarial seal this second day of July, in the year one thousand eight hundred and eighty-six.

PHILIP G. BARTLETT,
Notary Public, New York County.

[SEAL.]

47 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this second day of July, in the year one thousand eight hundred and eighty-six, before me, the subscriber, a notary public in and for said city and county, personally came John W. Simpson, the vice-president, and William M. Barnum,

the secretary, of the Kanawha and Ohio Railway Company, the corporation which executed the foregoing instrument, and whose names are signed to the foregoing writing, bearing date on the first day of May, one thousand eight hundred and eighty-six, and acknowledged the signing of the foregoing instrument to be the act and deed of the said corporation for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my notarial seal this second day of July, in the year one thousand eight hundred and eighty-six.

PHILIP G. BARTLETT,
Notary Public, New York Co.

[SEAL.]

48 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this sixth day of July, in the year one thousand eight hundred and eighty-six, before me, the subscriber, a notary public in and for said city and county, personally came Henry C. Deming, known to me to be the secretary of the Mercantile Trust Co., the corporation described in and which executed the foregoing instrument, who, being by me duly sworn, did depose and say that he resides in the village of Highlands, county of Monmouth, State of New Jersey; that he is the secretary of the said The Mercantile Trust Company and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the corporate seal of the said company and was thereto affixed by order of the board of directors of the said company, and that he signed his name thereto by the like order as secretary of said company; and the deponent further said that he is acquainted with Louis Fitzgerald, and knows him to be the president of said company; that the signature of the said Louis Fitzgerald subscribed to the foregoing instrument is in the genuine handwriting of the said Louis Fitzgerald and was thereto subscribed by the like order of the said board of directors and in the presence of said deponent.

In witness whereof I have hereunto set my hand and notarial seal this sixth day of July, in the year one thousand eight hundred and eighty-six.

PHILIP G. BARTLETT,
Notary Public, New York County. [SEAL.]

49 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this 6th day of July, in the year one thousand eight hundred and eighty-six, before me, the subscriber, a notary public in and for said city and county, personally came Louis Fitzgerald, the president, and Henry C. Deming, the secretary, of the Mercantile Trust Co., the corporation which executed the foregoing instrument, and whose names are signed to the foregoing writing bearing date on the first day of May, one thousand eight hundred and eighty-six, and acknowledged the signing of the foregoing instrument to be the act and deed of the said corporation for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed the notarial seal this sixth day of July, in the year one thousand eight hundred and eighty-six.

PHILIP G. BARTLETT,
Notary Public, New York County.

[SEAL.]

STATE OF WEST VIRGINIA:

KANAWHA COUNTY COURT,
CLERK'S OFFICE, *July 28th*, 1886.

This mortgage was this day presented to me in my office, and thereupon, together with the certificates thereto annexed, is admitted to record in Trust Deed Book No. 7, page 607 *et seq.*

Teste: J. W. GOSHORN,
Clerk Kanawha County Court.

50 STATE OF WEST VIRGINIA:

PUTNAM COUNTY COURT,
CLERK'S OFFICE, *July 29th*, 1886.

This mortgage was this day presented to me in my office, and thereupon, together with the certificates — acknowledgments thereto annexed, is admitted to record in Trust Deed Book No. 4, page one, &c.

Teste: W. T. ALEXANDER,
Clerk Putnam County Court, West Va.

STATE OF WEST VIRGINIA:

MASON COUNTY COURT,
CLERK'S OFFICE, *July* 30, 1886.

This mortgage was this day presented to me in my office, and thereupon, together with the certificates thereto annexed, is admitted to record in Trust Deed Book No. 9.

Teste: J. P. R. B. SMITH,
Clerk Mason County Court.

STATE OF OHIO, }
Gallia County. }

JULY 30T-, 1886—1.15 p. m.

This mortgage was this date presented for record in my said county and duly recorded in Mortgage Book No. 15, pages 183, &c.

Teste: J. F. CHAPMAN,
Recorder Gallia Co.

51 STATE OF OHIO, }
Meigs County, } ss:

JULY 30TH, 1886—5 p. m.

This mortgage was this date presented for record in my said county and duly recorded in Mortgage Book No. 18, pages 247, &c.

MARION CLINE,
Recorder of Meigs County, Ohio.

STATE OF OHIO, } ss:
Athens County, }

This instrument filed for record July 31st, 1886, at 10.05 a. m. Duly recorded in vol. 17, pages 435, &c.

Atteste: L. HAWK, *Recorder.*

RECORDER'S OFFICE, PERRY CO., OHIO.

This instrument filed for record July 31st, 1886, at 4 o'clock p. m. Recorded August — in volume S, pages 120, &c.

C. H. TINKER, *Recorder.*

52 EXHIBIT "B."

Agreement made this second day of July, A. D. 1886, between Erwin Davis and John W. Simpson, of New York, of the first part, and the Mercantile Trust Co-pany, a corporation organized and existing under and by virtue of the laws of the State of New York, of the second part.

Whereas, cotemporaneously with the making and delivery of this agreement, for the purpose of carrying out the provisions of an agreement entitled "agreement for the reorganization of the Ohio Central Railroad Company, River division," dated the 7th day of March 1885, the said parties of the first part have assigned transferred and set over to the party of the second part, nine thousand nine hundred and eighty shares of the capital stock of the Point Pleasant Bridge Company, of the par value in the aggregate of nine hundred and ni-ety-eight thousand dollars, and bonds of the said bridge company for the principal sum in the aggregate of one million dollars, secured to be paid by a certain mortgage or deed of trust, -ade by the said Point Pleasant Bridge Co. to John W. Simpson, as trustee dated the 25th day of June A. D. 1886, upon the bridge and appurtenant property of the said bridge Co., in order to further secure the payment of a series of bonds of the Kanawha and Ohio Railway Company for the principal sum of one thousand dollars each, and not exceeding eighteen hundred in number, to become due January first A. D. 1936 which bonds are secured by a certain mortgage or deed of trust made in pursuance of the said agreement of reorganization, dated the first day of May A. D. 1886, and conveying all the property, rights, privileges and
53 franchises of the said railway company to the party of the second part hereto, as trustee, in which mortgage or deed of trust it is covenanted by the said railway company that it will cause securities representing the entire ownershi- and interest in the bridge and appurtenant property aforesaid, to be pledged and charged as additional security for the said issue of bonds of the said railway company.

Now, therefore, this instrument, witnesseth:

That, in consideration of th- premises and of the sum of one dollar by each of the parties hereto received from the other party, it is agreed between the parties hereto, that said bonds and stock are

delivered by the parties of the first part and are received by the party of the second part for the following purposes, and are to be held, dealt with and used by the party of the second part according to the following stipulations:

First. The said bonds and stock are to be held as security for all the bonds issued or to be issued under the first mortgage of the Kanawha and Ohio Railway Company aforesaid, in addition to the security of the mortgage of said railway company securing the same.

Second. Upon payment in full of any instalment of interest upon all the bonds then outstanding issued under the said first mortgage of the Kanawha and Ohio Railway Company, the interest upon the bonds of the said Point Pleasant Bridge Company shall be deemed and treated as paid for the corresponding period, and upon demand of the said railway company at any time the party of the second part shall endorse upon said bonds of the said bridge Co. a statement showing the interest paid accordingly.

54 Third. Upon payment in full of all the bonds secured by said first mortgage of said railway company, or upon the cancellation thereof or other discharge of the liabilities thereon the obligations upon said bonds of the bridge company shall wholly cease and determine and upon demand of the said railway company said bonds of the bridge company shall be cancelled and surrendered to the said railway company, or at the option of the said railway company said bonds of said bridge company may be treated as still in force and transferred and delivered to the said railway company.

Fourth. Except as otherwise herein provided, the party of the second part shall have all the rights of holders of said bonds of said bridge company, such rights, however, to be exercised only for the purpose of securing the said first-mortgage bonds of said railway company for the benefit of the holders thereof as such.

Fifth. The stock of the said bridge company which has been transferred as aforesaid to the party of the second part, with all the rights attaching thereto, shall be held by it either in its own name, or in the name of such person or persons as it shall designate as its agents or agent for the purpose, but so long as the said The Kanawha and Ohio Railway Company shall not be in default in any respect under the provisions of its said first mortgage the voting power of said bonds shall be used so far as may be lawful in accordance with the directions and instructions of the said railway company.

55 Sixth. The said stock of the said bridge company shall be transferred and assigned to such person or persons or corporations or corporations as the said railway Co. shall designate for the purpose, upon demand of the said railway company, at any time; when said bonds issued and to be issued under said railway company first mortgage shall have been paid and discharged in full, or otherwise satisfied or discharged.

The intention of this instrument is, that all the said bonds and stock hereinbefore stated to have been transferred and assigned to

the party of the second part shall be held charged first, for the benefit of the holders from time to time of all bonds issued or to be issued under the said first mortgage of the said railway company, and thereafter for the benefit of and subject to the direction of the said railway company.

In witness where-, the parties of the first part have hereunto set their hands and seals, and the party of the second part has caused this instrument to be signed by its president, and its corporate seal to be hereunto affixed, attested by its secretary the day and year first above written.

JOHN W. SIMPSON. [L. S.]
ERWIN DAVIS. [L. S.]
THE MERCANTILE TRUST COMPANY,
[SEAL.] By EDW'D L. MONTGOMERY,
Vice-president.

Attest: H. C. DEMING, *Secretary.*

56 STATE OF NEW YORK, } *ss:*
City and County of New York, }

I, Philip G. Bartlett, a notary public in and for the city and county aforesaid, do certify that John W. Simpson, whose name is signed to the foregoing instrument, bearing date on the 2nd day of July, A. D. 1886, has this day acknowledged the same before me in my said county.

Given under my hand and official seal this 2nd day of July, 1886.

[SEAL.] PHILIP G. BARTLETT.
Notary Public, New York County.

STATE OF NEW YORK, } *ss:*
City and County of New York, }

I, Frederick Specht, a notary public in and for the city and county aforesaid, do certify that Erwin Davis, whose name is signed to the foregoing instrument, bearing date on the 2nd day of July, A. D. 1886, has this day acknowledged the same before me in my said county.

Given under my hand and official seal this tenth day of August, 1886.

F. SPECHT,
Notary Public, Kings & N. Y. Co's. [SEAL.]

STATE OF NEW YORK, } *ss:*
City and County of New York, }

57 Be it remembered that on this — day of ——, in the year one thousand eight hundred and eighty-six, before me, the subscriber, a notary public in and for said city *snf* county, personally came Louis Fitzgerald, the president, and Henry C. Deming, the secretary, of the Mercantile Trust Co., the corporation which executed the foregoing instrument, and whose names are signed to the foregoing writing, bearing date on the 2nd day of July, A. D.

1886, and acknowledged the signing of the foregoing instrument to be the act and deed of the said corporation for t-e uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my notarial seal this — day of ——, in the year 1886.

—— ——.

The foregoing agreement is a copy of an original agreement filed with the Mercantile Trust Company.

H. C. DEMING, *Sec'y.*

58 And afterwards, to wit, on the 18th day of February, A. D. 1889, there was issued out of the clerk's office of said court our certain subpœna in chancery directed to the marshal of the district and against the defendant herein. Said subpœna is clothed in the words and figures following, to wit:

Subpœna in Chancery.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon the Kanawha and Ohio Railway Company, citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio, eastern division aforesaid, at Columbus, on the first Monday in May next, to answer a certain bill in chancery filed and exhibited in said court against it by the Mercantile Trust Co., trustee, citizen of and resident in the State of New York. Hereof you are not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of February, A. D. 1889, and in the 113th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.* [SEAL.]

59 MEMORANDUM.—The said defendant is required to enter its appearance in this suit in the clerk's office of said court on or before the first Monday of April, 1889; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.* [SEAL.]

And afterwards, to wit, on the 19th day of February, A. D. 1889, the following appearance was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appearance of Earnhart, Hunter & Butler.

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA AND OHIO RAILWAY CO.

To the clerk of said court:

The Kanawha and Ohio Railway Co. now comes and, by its solicitors, Earnhart, Hunter and Butler, waives the issue and service of process and hereby enters its appearance.

EARNHART, HUNTER & BUTLER,
Solicitors for the K. & O. R'y Co.

February 19, 1889.

And afterwards, to wit, on the 20th day of Feb., A. D. 1889, an order was made upon the order book of said court clothed in the words and figures following, to wit:

O. B. A, p. 103.

69 Now, on this 19th day of February, 1889, comes the complainant, The Mercantile Trust Co., by Alexander & Green and Simpson, Thacher and Barnum, its solicitors, and William W. Green and Thomas Thacher, its counsel; and comes the defendant, The Kanawha and Ohio Railway Co., by Couch & Knight, its solicitors, and E. B. Knight, its counsel; and the said complainant exhibits to the court its sworn bill of complaint, filed herein on the 18th day of February, 1889, and makes application for the appointment of a receiver as therein prayed; and said application coming on to be heard upon said bill and exhibits and the affidavits of Samuel L. Post, Jr., Robert W. Kelley, and upon the appearance of the defendant it appearing that process has been served upon said defendant and that it has appeared in this cause, and that said defendant does not oppose the granting of this application, and the matter having been fully presented to the court and argued by counsel, and the court being fully advised in premises, it is upon consideration ordered, adjudged, and decreed that said application be, and the same is hereby, granted as follows:

1st. Robert W. Kelley, Esq., is hereby appointed receiver of all and singular the property, real, personal, and mixed, of every description of the said Kanawha and Ohio Railway Co., wheresoever situate, with all the powers, rights, and duties of receivers in like cases and with the powers, rights, and duties as herein set forth.

2nd. The said receiver shall forthwith enter upon and take possession of all and singular the property, real and personal, equitable interests, rights in action, effects, money, receipts and earnings, rights, privileges, and franchises of the defendant, and have, hold, use, operate, exercise, and manage the same and run the rail-
61 road of the defendant until the further *or until the further* order of this court, obeying in all things the orders of this court.

3rd. And it is further ordered that said railway Co., its officers and agents or whoever may have possession thereof, assign, transfer, and deliver over to said receiver all the property, real and personal, wherever situated, and all equitable interests, things in action, or other effects of said company or in which it has any beneficial interest and all books, vouchers, and other papers touching its accounts or touching the operation and management of said road and property.

4th. Out of the moneys and income coming into his hands from said properties the receiver may pay all taxes imposed upon said property by State of municipal authorities, and he may also make and out of said income and moneys pay for such repairs and supplies as shall be necessary to keep the property as a going concern.

5th. The said receiver is authorized and empowered to prosecute, defend, and continue any suits or actions now pending or which may hereafter be brought having for their subject-matter any rights or liabilities of the defendant or in any way affecting its property.

6th. The said receiver shall cause to be kept just, full, and true account of any money, income, or property received and of disbursements made by him and shall report his doings to this court, with said accounts, from time to time and at least once in each year, and said receiver may apply to this court for instructions and for such further order or orders as from time to time may be necessary or advisable.

62 7th. The said receiver shall take an oath to faithfully perform his duties hereunder and with one or more sureties shall execute to the clerk of the court for the benefit of all concerned an undertaking, to be approved by the court or the clerk thereof, in the sum of $100,000, *dollars*, conditioned that he will faithfully perform his duties hereunder and in all respects obey the orders of this court.

8th. And it appearing that certain stocks and bonds of the Point Pleasant Bridge Co. are now in the possession of the complainant, it is ordered that the said stock and bonds remain in the possession and control of the complainant until the further order of this court.

General Balance-sheet to December 31st, 1888.

Bonds & stock (P. P. B. Co.)			2,000,000 00	First mortgage		1,160,000 00
Cost of road			11,597,707 48	First-preferred stock		6,600,000 00
Equipment			350,000 00	Second-preferred stock		4,000,000 00
				Common stock		2,200,000 00
				Car-trust bonds		56,000 00
				Mineral Division Ohio Central 1st mort.		107,000 00
				" " " " income bonds		4,000 00
ASSETS.				LIABILITIES.		
United States Post Office Department	1,765 76			Unclaimed wages	522 50	
United States Express Co	271 82			Foreign ticket balances	1,769 79	
Accounts receivable	8,464 05			County & State treasurers	9,657 58	
Agents and conductors	6,204 26			Columbus, H. V. & T. R'y	1,666 66	
Material & supplies	7,585 54			Shawnee & Muskingum River R'y	208 34	
Unearned premiums	935 02			Chesapeake & Ohio R'y Co	883 95	
Cash on hand	17,223 04			Accrued interest	35,483 32	
Cash in transit	6,872 79			Overdue coupons	35,970 00	
Foreign ledger	540 85			Account payable	29,571 43	
Foreign claims	677 75			Pay-rolls	14,025 64	
Mainte. dep't	578 24			Bills payable	367,743 32	
Road "	9,585 39			Charleston & Gauley	5,860 89	
T. & O. C. R'y	624 99			T. R. Sharpe, spe. com'r	3,155 28	
Kan. Imp. Co	25,000 00			Ohio Central car trust	518 28	
		86,329 50				507,036 98

[SEAL.]

64 Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Complainant, *against* THE KANAWHA AND OHIO RAILWAY COMPANY, Defendant. } No. 479. In Equity.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Robert W. Kelley, of lawful age, being duly sworn, deposes and says: I am president of the above-named defendant, The Kanawha and Ohio Railway Company, and have been since March 19, 1888. I am well acquainted with its affairs and its financial condition. The within general balance-sheet shows correctly and truthfully such financial condition on the 31st day of December last. The same has not been substantially changed since that date.

ROBERT W. KELLEY.

Subscribed and sworn to before me this 15th day of February, 1889.

[SEAL.] PHILIP G. BARTLETT,
Notary Public, New York Co.

65 And afterwards, to wit, on the 20th day of February, A. D. 1889, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the U. S. for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY *vs.* THE KANAWHA AND OHIO RAILWAY COMPANY. } No.—. In Equity.

UNITED STATES OF AMERICA, *City, County, and State of New York,* } *ss:*

Samuel L. Post, Jr., being duly sworn, deposes and says: I am of lawful age and reside in the city of New York.

I am president of the Kanawha Improvement Co., a corporation duly organized and existing under the laws of the State of West Virginia. I am familiar with the affairs and conditions of *the* the Kanawha and Ohio Railway Co. and with its indebtedness, earnings, and requirements. Its unsecured debt now amounts to about $325,000. Its earnings are insufficient to pay the expenses of operation, maintain the road, and pay any interest upon its bonds. The company has reached the limit of its capacity to borrow. The Kanawha Improvement Co., of which I am president as aforesaid, owns a majority of the capital stock of the said railway company, and also nearly the whole of the said railway company's floating indebtedness. The said railway Co. is in my opinion insolvent. The interests of its creditors, secured and unsecured, would, I be-

lieve, be favored by the appointment of Robert *appointment of*
66 *Robert* W. Kelley as its receiver *by the appointment of Robert W. Kelley as its receiver* with the usual powers. The said improvement Co., as creditor and stockholder, hereby assents to such appointment.

SAM'L L. POST, JR.

Sworn to before me this 16th day of Feb., 1889.

HENRY B. ANDERSON,
[SEAL.] *Notary Public, New York Co.*

And afterwards, to wit, on the 21st day of February, A. D. 1889, the following oath of receiver was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Oath of Receiver Robert W. Kelley.

THE MERCANTILE TRUST CO. }
vs.
THE KANAWHA & OHIO RAILWAY CO. }

SOUTHERN DISTRICT OF OHIO, }
City of Columbus, } *ss:*

Robert W. Kelley, being duly sworn, says that, having been appointed receiver of the property of the above-named The Kanawha and Ohio Railway Co. by order made and entered in the above-entitled cause, he doth promise and upon oath agree to faithfully perform his duties as such receiver under said order and under such further orders as may be made in said cause.

ROBERT W. KELLEY.

Subscribed and sworn to before me this 20th day of February, 1889.

R. B. SMITH,
Notary Public, Franklin County, Ohio. [SEAL.]

67 And afterwards, to wit, on the 22nd day of Feb., A. D. 1889, came the marshal to whom the above subpœna was in form directed and filed the same in the clerk's office, with his proceedings had endorsed thereon, in the words and figures following, to wit:

Marshal's Return.

Received this writ at Columbus, Ohio, Feb. 18, 1889, and on the same day, Feb. 18, 1889, I served a true copy of this writ personally on C. C. Hunter, at Columbus, Ohio, a director of the within-named company, the Kanawha and Ohio Railway Co., and on the same day, Feb. 18, 1889, I served a true copy of this writ personally on F. W. Fenstermaker, at Columbus, Ohio, a clerk and telegraph operator in the employ of the within-named Co., the Kanawha and Ohio Railway Co., and on Feb. 19, 1889, I served a true copy of this

writ personally on Robert W. Kelley, at Columbus, Ohio, the President of the within-named company, the Kanawha and Ohio Railroad Co.

Fees, total, $7.68.

H. C. URNER,
U. S. Marshal, S. D. O.,
By ROBERT BELL, *Deputy.*

And afterwards, to wit, on the 28th day of February, A. D. 1889, the following bond of receiver was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Bond of Receiver.

Receiver's bond.

Know all men by these presents that we, Robert W. Kelley, as principal, and H. D. Turney, as sureties, are held and firmly
68 bound unto the clerk of the circuit court of the United States for the southern district of Ohio, eastern division, in the penal sum of one hundred thousand dollars, as witness our hands and seals this 20th day of February, A. D. 1889.

The conditions of the above-recited obligations are such that whereas the said Robert W. Kelley has been appointed by the circuit court of the United States for the southern district of Ohio to be receiver of the property, real, personal, and mixed, of every description, of the Kanawha and Ohio Railway Co., wherever situated, in a certain action pending against said company in said circuit court of the United States for the southern district of Ohio, wherein The Mercantile Trust Company of New York is plaintiff and The Kanawha and Ohio Railway Co. is defendants, as by the records of said court will more fully appear:

Now, therefore, if the said Robert W. Kelley, receiver as aforesaid, shaol well and truly perform all and singular the duties and obligations assumed by him as such receiver and shall pay over all moneys to such proper persons as may be ordered or required of him by authority of law, and fully and faithfully account for all the property that may come into his hands in pursuance of his said duties as receiver, and shall further abide by and perform all the orders made and which may hereafter be made by said circuit court of the United States according to the best of his skill and ability, then the foregoing obligations shall be void; otherwise to be and remain in full force and virtue in law.

R. W. KELLEY. [SEAL.]
H. D. TURNEY. [SEAL.]

69 STATE OF OHIO, } *ss:*
Franklin County, }

Personally appeared before me, the undersigned authority, Robert W. Kelley, the principal who has signed the foregoing bond, and made oath that he was worth, over and above all debts and liabilities, at least one hundred thousand dollars.

——.

Sworn to before me and subscribed in my presence this 25th day of February, 1889.

R. B. SMITH,
[SEAL.] *Notary Public, Franklin County, Ohio.*

THE STATE OF OHIO, } ss:
Franklin County, }

Personally appeared before me, the undersigned authority, H. D. Turney, the surety who has signed the foregoing bond, and made oath that he was worth, over and above all debts and liabilities, at least one hundred thousand dollars.

H. D. TURNEY.

Sworn to before me and subscribed in my presence this 25th day of February, 1889.

R. B. SMITH,
Notary Public, Franklin County, Ohio. [SEAL.]

The above bond is hereby approved.

B. R. COWEN, *Clerk.*

70 THE STATE OF OHIO, } ss:
County of Franklin, }

I hereby certify that on the 20th day of February, 1889, before me, a notary public duly commissioned and sworn, personally came Robert W. Kelley, to me personally known and known to me to be the same person mentioned and subscribed in the and who executed the foregoing bond as receiver of the Kanawha and Ohio Railway Company, and acknowledged that he executed the foregoing bond as receiver of the Kanawha and Ohio Railway Company and acknowledged that the same is his voluntary act and deed.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

R. B. SMITH,
[SEAL.] *Notary Public, Franklin County, Ohio.*

71 THE STATE OF OHIO, } ss:
County of Franklin, }

I hereby certify that on the 20th day of February, 1889, before me, a notary public duly commissioned and sworn, personally came H. D. Turney, to me personally known and known to me to be the same person mentioned and subscribed in the and who executed the foregoing bond as surety of said receiver of the Kanawha and Ohio Railway Company, and acknowledged that he executed the foregoing bond as receiver of the Kanawha and Ohio Railway Company and acknowledged that the same is his voluntary act and deed.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

R. B. SMITH,
[SEAL.] *Notary Public, Franklin County, Ohio.*

72 And afterwards, to wit, on the 13th day of March, A. D. 1889, the following petition for leave, &c., was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition for Leave to Issue Receiver's Certf.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant,
vs.
THE KANAWHA AND OHIO RAILWAY CO., Defendant. } In Equity.

Petition of receiver for leave to issue receiver's certificates for supplies, wages of employees, taxes, equipment, &c.

Now, on this day, comes Robert W. Kelley, receiver, and respectfully shows to this honorable court:

1. That pursuant to the order of this court heretofore made and entered in this cause he has duly made and filed his oath and his bond or undertaking, duly a-proved by the clerk of this court, in all res-ects as required by the said order, and pursuant to said order has taken possession of the property of the defendant railway company.

2. That after a careful examination into the affairs of said company he has ascertained that th-re is due to the employees and office force of said company, viz., trackmen, engineers,
73 firemen, machinists, trainmen, station and land laborers, bridge-builders, mechanics, clerks in the operating and general offices, and heads of departments, including the treasurer and auditor, but not including the president, the sum of twenty thousand ninety-nine and $\frac{56}{100}$ dollars, and that such services were rendered and such labor performed during the 50 days next preceeding such order, except as to $556.26 thereof, previous wages not yet called for, and that, as your petitioner is informed and -elieves, no further or other sum is due for labor or services performed prior to the appointment of your petitioners as receiver herein.

3. That there is due for supplies furnished to the said railway company during the one hundred and forty days next preceeding the date of said order about the sum of nineteen thousand dollars ($19,000); that the exact amount cannot be stated until certain accounts known to exist but not yet rendered have been presented. But estimating such accounts as accurately as possible your petitioner believes that the said sum of nineteen thousand dollars ($19,000) will cover all unpaid accounts for supplies furnished prior

to the appointment of your petitioner herein. Possibly $2,000, but not more, of the supplies were furnished before the period above stated.

4. That there is due for taxes on the railway and property of said company in the State of Ohio and in the State of West Virginia the sum of ten thousand one hundred and forty-seven and $\frac{19}{100}$ dollars ($10,147.19), and about twenty-three hundred and *and* fifty dollars will become due for taxes in June, making an aggregate of twelve thousand four hundred and ninety-seven and $\frac{19}{100}$ dollars ($12,497.19).

74 5. That heretofore the said railway Co. entered into a contract with Messrs. Burnham, Parry, Williams & Co. for the lease and purchase of locomotive engines, a copy of which contract is hereto attached, marked Exhibit "A."

That on account of the purchase price of said locomotives and interest accrued thereon the said company has paid the sum of forty-seven thousand ninety-nine and $\frac{62}{100}$ dollars ($47,099.62), and that there remains unpaid thereon the sum of four thousand seven hundred and sixty-six and $\frac{88}{100}$ dollars ($4,766.88), represented by the railway Co.'s three promissory notes, each for the principal sum of one thousand, five hundred and eighty-eight and $\frac{96}{100}$ dollars ($1,588.96), one of which notes matured on the 9th day of March, instant, and the others of which will mature on the 9th day of April and the 9th day of May next, respectively.

6. That the said railway Co. heretofore entered into a contract with Messrs. Burnham, Parry, Williams and Co. for the purchase of four locomotives, a copy of which contract is hereto attached, marked Exhibit "B."

That on account of the purchase price of said locomotives and interest accrued thereon the said railway Co. has paid twenty-five thousand six hundred and ninety-four and $\frac{17}{100}$ dollars ($25,694.17), and there remains unpaid the sum of five thousand seven hundred and eighty-six and $\frac{58}{100}$ dollars ($5,786.58), represented by said company's six promissory notes, each for the principal sum of nine hundred and sixty-four and $\frac{43}{100}$ dollars ($964.43) and interest, one of which notes matured on the 7th day of March, instant, and the others of which will mature monthly—that is to say, one of

75 said notes will mature on the 7th day of each succeeding month, beginning with the 7th day of April next.

7. That heretofore the said company entered into a contract with the Pullman Palace Car Co., Limited, for the lease and purchase of cars, a copy of which contract is hereto attached, marked Exhibit "C."

That on account of the purchase price of said cars the said company has paid one hundred thousand seven hundred and twenty-four and $\frac{43}{100}$ dollars ($100,724.43), and there remains unpaid thirty-eight thousand seven hundred and forty-five and $\frac{33}{100}$ dollars ($38,745.33), represented by the said company's thirteen promissory notes for the principal sum of two thousand nine hundred and eighty and $\frac{41}{100}$ dollars ($2,980.41) each, one of which notes matured on the first

day of March, instant, and the others of which mature, one on the 1st of April next and one on the first day of each succeeding month.

8. That heretofore the said company entered into a contract with Robert Seney, trustee, for the lease and purchase of cars, a copy of which contract is hereto attached, marked "Exhibit D."

That on account of the rent and purchase price of said cars and *and* interest accrued thereon the said company has paid sixty-seven thousand six hundred and fifty dollars ($67,650), and there remains unpaid fifty-six thousand dollars ($56,000) and the interest to accrue thereon, represented by 56 bonds of the said company for the principal sum of $1,000 each and the interest coupons attached thereto.

That by virtue of the terms of said contract there will mature or fall due on the first day of May next coupons attached to
76 said bonds and representing the interest therein to the amount *to the amount* of one thousand nine hundred and sixty dollars ($1,960).

9. That besides the engines and cars procured by the defendant railway Co. under the contracts mentioned in the foregoing paragraphs 5, 6, 7, and 8, the said company has no equipment or rolling stock whatsoever except four engines, two of which are practically disabled, and eleven passenger, baggage, and mail and a few ditching cars; that the value of said locomotives and cars covered by said contracts in each case greatly exceeds the amount remaining unpaid thereon by the terms of said contracts; that they are in constant use by your petitioner, the said receiver, and are all necessary to the proper operation of the said railroad, and that in order to retain the possession and use thereof it will be necessary, as your petitioner is advised and believes, to pay the said promissory notes promptly as they severally mature.

10. That obeying the order of this court directing him to operate the said railway, and having due regard to efficiency and economy of operation, your petitioner has found it necessary to employ substantially the same force of employees, clerks, and others as were employed by the railway company before his appointment, and that, as he is informed and believes, all the funds in hand and all the earnings and income, rents, and profits to be derived from the operation of the said railway and other property are now required, and during the next six months, if not for a longer period, will be required, to meet the necessary expenses of operating, maintaining, and preserving the same, leaving nothing after meeting such expenses applicable to the payment of the indebtedness in this petition mentioned.

77 11. That, as your petitioner is advised and believes, in order to preserve the said equipment and assure the efficient and economical operation of the said railroad and preserve the business thereof, it will be necessary to pay the sums hereinbefore mentioned as due or to become due, and that if said sums be paid it will be necessary to borrow the money needed for the purpose.

Wherefore your petitioner prays—

That this court direct and instruct him in the premises, and that

he be authorized to pay as and when the same is or shall become due and payable the indebtedness mentioned in paragraphs Nos., respectively, 2, 3, 4, 5, and 6 of this petition, so much of the indebtedness mentioned in paragraph 7 hereof as shall become due and payable on or before Sept. 1 next, and the said sum of one thousand nine hundred and sixty dollars ($1,960) which falls due on the 1st day of May next under said contract marked "Exhibit D."

And that he be authorized to borrow the money needed to pay said indebtedness not exceeding in the aggregate the sum of eighty-eight thousand dollars, and for the money so borrowed to make and issue his certificates of indebtedness in such form as to the court shall seem proper, bearing interest from the date thereof until paid at the rate of six per cent. per annum.

And that he be authorized to sell and dispose of the said certificates from time to time as the said indebtedness matures and becomes payable at not less than the par value thereof, and, if necessary, to pay a commission not exceeding 2½ per cent. for the negotiation of said certificates and to use the proceeds of said sale or sales in the payment of said indebtedness.

And that said certificates be made and declared to be a debt of your petitioner and his successors, as receiver, incurred for
78 the benefit and protection of the mortgaged property in his hand and a lien prior to the lien of the mortgage or deed of trust to foreclose which this suit is brought on the railroad and other property covered by said mortgage or deed of trust, and that the earnings of the said railway, after deducting the expenses of operating, maintaining, preserving, and keeping in repair the said railroad property and the expenses of the receivership, be made applicable to the payment of the principal and interest of the said certificates.

And that the court make such other and further orders in the premises as to the court may seem proper.

And your petitioner will ever pray, &c.

ROBERT W. KELLY, *Receiver.*

STATE OF MICHIGAN, } ss:
City of Detroit, }

Robert W. Kelly, being first duly sworn, upon his oath states that the several matters and things set forth in the above and foregoing petition are true to the best of his knowledge and belief.

ROBERT W. KELLEY.

Subscribed and sworn to before me this 12th day of March, 1889.

WALTER S. MARSHA,
Clerk U. S. Circuit Court, East. Dist. of Michigan. [SEAL.]

79 EXHIBIT "A."

Contract.

This agreement, made and entered into this 9th day of Nov., 1886, by and between Burnham, Parry, Williams & Co., proprietors

of the Baldwin locomotive works, of the city of Philadelphia, party of the first part (hereinafter called the lessors), and the Kanawha and Ohio Railway Company, party of the second part (hereinafter called the lessees), witnesseth:

That the lessors this day loan to the lessee- — locomotives, manufactured by the lessors, and described as follows:

Having the Baldwin locomotive works', class designation 8–30 D, 223, 224, 225, 226, 227, and 228, and the lessees' numbers # 90, 91, 92, 93, 94, & 95, with the privilege of using the same, at their (said lessees') own risk upon their railroad, and upon such other lines of railroad as are leased or controlled by them for the term of thirty months, from the date hereof; at the expiration of which time the lessees will return the same to the lessors at their works in the city of Philadelphia, in their present good order and condition, without deterioration through wear and tear, and without excuse for non-delivery because of unavoidable accidents, unless purchased by the lessees from the lessors within the time and in the manner hereinafter specified.

It is agreed that the value of each of said six (6) locomotives is eight thousand & ninety-five ($8,095) dollars, and that if all
80 or either be in any way lose or destroyed prior to actual redelivery to lessors, said value with interest from the date of this contract, less two-thirds of the rent (to be credited *pro rata* to each) that may have been previously paid for the use of said locomotives shall, notwithstanding anything herein contained become immediately due and payable, and shall be paid by the lessees to the lessors, and in case said locomotives or any of them shall be returned to, or be reclaimed by the lessors under the provisions of this contract, in a damaged condition, the amount of any damage so done shall be paid by the lessees to the lessors; which said damage shall be conclusively determined, without right of appeal, by the written finding of all, or a majority of, three arbitrators, residing in the city of Philadelphia, to be appointed one by each of the parties of the first and second part-, and a third by the two first chosen. If within five days after notice to the party of the second part to name an arbitrator one be not named to them, the party of the first part may forthwith name the three, who shall act with the effect as if they had been mutually chosen.

It is further agreed, that the lessees will not use, nor allow the said six (6) locomotives to be used, other than as is herein permitted nor remove, nor allow the same to be removed from the railroad whereon the same may so lawfully be used without the written consent of the lessors first had and obtained. The marks on both sides of said locomotives and tenders "Burnham, Parry, Williams and Co., lessors and owners," shall be permitted to remain at all times legible and distinct.

It is further agreed that the lessors may at any time, if they shall so elect, effect insurance or insurances in their own names on each of said locomotives for an amount not greater than the valuation above agreed upon, and that the lessees shall, before being en-
81 titled to demand the delivery of any bill of sale to them under

the option hereinafter given them, reimburse said lessors for any such outlays, with interest.

The lessees agree to pay to the lessors the following sums as rent for said locomotives :

On the 9th day of November, 1886			$12,142 50
Six	months	after	1,588 96
Seven	months	"	1,588 96
Eight	"	"	1,588 96
Nine	"	"	1,588 96
Ten	"	"	1,588 96
Eleven	"	"	1,588 96
Twelve	"	"	1,588 96
Thirteen	"	"	1,588 96
Fourteen	"	"	1,588 96
Fifteen	"	"	1,588 96
Sixteen	"	"	1,588 96
Seventeen	"	"	1,588 96
Eighteen	"	"	1,588 96
Nineteen	"	"	1,588 96
Twenty	"	"	1,588 96
Twenty-one	"	"	1,588 96
Twenty-two	"	"	1,588 96
Twenty-three	"	"	1,588 96
Twenty-four	"	"	1,588 96
Twenty-five	"	"	1,588 96
Twenty-six	"	"	1,588 96
Twenty-seven	"	"	1,588 96
Twenty-eight	"	"	1,588 96
Twenty-nine	"	"	1,588 96
Thirty	"	"	1,588 96

82 making in all the sum of fifty-one thousand eight hundred & 66 & $\frac{50}{100}$ dollars ($51,866.50), for which amount, in instalments as above, promissory notes have been given by the lessees to the lessors.

It is further agreed that time shall be of the essence of this contract and shall not be relievable against in equity or at law.

It is further agreed that if at any time the lessees shall make any default in performance of any of their undertakings herein entered into, or shall fail to pay said rent as it matures or having paid said rent, shall fail within the time limited above to purchase and pay for said locomotives, then said lessors may, at their option, without demand first made, repossess themselves of said six (6) locomotives and hold the same discharged from any further liability hereunder, and from lessees' option to purchase and shall be entitled to hold and retain all rent theretofore paid to them, and to recover forthwith from the lessees rent at the rate aforesaid up to the time of such repossession, together with damages to be ascertained by arbitration as above, in case of injury to said locomotives, and with damages, in addition, for breech of agreement; which last damages shall be ascertained and liquidated by charging the lessees with

rent, as above, from date of such repossession to the end of this term, as if the same was then actually due and payable and by allowing them a credit, less expenses of two-thirds of the actual value at that time of the locomotives thus repossessed.

After the lessees shall have faithfully performed all the stipulations of this contract, in manner and form as is herein provided, without default, and shall have reimbursed all outlays, as aforesaid, for insurance, then it is agreed that the lessees may, at their option, at any time within one month after the time of maturity as above of the last instalment of rent, purchase said six locomotives at the price of one dollar, and upon the payment of said sum to them, the lessors shall thereupon, by bill of sale convey said six locomotives to said lessees.

Nothing herein contained, and no action hereunder, shall divest the title of the lessors to said six (6) locomotives until the rents above enumerated and the purchase-money, with insurance
83 premiums above named, shall have been fully paid by said lessees, and until a bill of sale therefore shall have been delivered. Until after such payment and delivery, the said six (6) locomotives shall remain the property of the lessors, and no right whatever thereto shall pass to the lessees excepting that of using the same in strict compliance with the terms of this contract.

It is agreed that the lessors may vest in an assignee or assignees all the rights and privileges hereby reserved to them.

Executed in duplicate the day and year above written.

BURNHAM, PARRY, WILLIAMS & CO.
THE KANAWHA AND OHIO RAILWAY CO.,
By ERWIN DAVIS, *President.*

Witnesses:
JOSEPH MACFANAN.
Witness as to E. Davis, Pt.,
E. R. LELAND.

84 EXHIBIT "B."

Contract.

This agreement, made and entered into this 7th day of February 1887, by and between Burnham, Parry, Williams & Co. proprietors of the Baldwin locomotive works, of the city of Philadelphia, party of the first part (hereinafter called the lessors), and the Kanawha and Ohio Railway Company, party of the second part (hereinafter called the lessees), witnesseth,

That the lessors this day loan to the lessee — locomotives, manufactured by the lessors, and described as follows:

Having the Baldwin locomotive works, class designation 8 | 24 C. 131 & 132, & 6 | 30 D. 48 & 49 and the lessees' numbers # 44, # 45, # 50 and # 51, with the privilege of using the same, at their (said lessors') own risk upon their railroad, and upon such other lines of railroad as are leased or controlled by them for the term of thirty months, from the date hereof; at the expiration of which

time the lessees will return the same to the lessors at their works in the city of Philadelphia, in their present good order and condition, without deterioration through wear and tear, and without excuse for non-delivery because of unavoidable accidents, unless purchased by the lessees from the lessors within the time and in the manner hereinafter specified.

It is agreed that the value of each of said four locomotives is seventy-three hundred and seventy dollars ($7,370) and that if
85 all or either be in any way lost or destroyed prior to actual redelivery to lessors, said value with interest from the date of this contract, less two-thirds of the rent (to be credited *pro rata* to each) that may have been previously paid for the use of said locomotives shall, notwithstanding anything herein contained become immediately due and payable, and shall be paid by the lessees to the lessors, and in case said locomotives or any of them shall be returned to, or be reclaimed by the lessors under the provisions of this contract, in a damaged condition, the amount of any damage so done shall be paid by the lessees to the lessors; which said damage shall be conclusively determined, without right of appeal, by the written finding of all, or of a majority of, three arbitrators, residing in the city of Philadelphia, to be appointed one by each of the parties of the first and second part, and a third by the two first chosen. If within five days after notice to the party of the second part to name an arbitrator one be not named to them, the party of the first part may forthwith name the three, who shall act with the effect as if they had been mutually chosen.

It is further agreed that the lessees will not use, nor allow the said four locomotives to be used, other than as is herein permitted nor remove, nor allow the same to be removed from the railroad whereon the same may so lawfully be used without the written consent of the lessors first had and obtained. The marks on both sides of said locomotives and tenders "Burnham, Parry, Williams and Co., lessors and owners," shall be permitted to remain at all times legible and distinct.

It is further agreed that the lessors may at any time, if they shall so elect, effect insurance or insurances in their own names on each of said locomotives for an amount not greater than the valuation above agreed upon, and that the lessees shall, before being entitled to demand the delivery of any bill of sale to them under the
86 option hereinafter given them, reimburse said lessors for any such outlays, with interest.

The lessees agree to pay to the lessors the following sums as rent for said locomotives:

On the seventh day of February, 1887			$7,370 00
Six	months after		964 43
Seven	months	"	964 43
Eight	"	"	964 43
Nine	"	"	964 43
Ten	"	"	964 43
Eleven	"	"	964 43

Twelve	months after	.....	$964 43
Thirteen	" "	.....	964 43
Fourteen	" "	.....	964 43
Fifteen	" "	.....	964 43
Sixteen	" "	.....	964 43
Seventeen	" "	.....	964 43
Eighteen	" "	.....	964 43
Nineteen	" "	.....	964 43
Twenty	" "	.....	964 43
Twenty-one	" "	.....	964 43
Twenty-two	" "	.....	964 43
Twenty-three	" "	.....	964 43
Twenty-four	" "	.....	964 43
Twenty-five	" "	.....	964 43
Twenty-six	" "	.....	964 43
Twenty-seven	" "	.....	964 43
Twenty-eight	" "	.....	964 43
Twenty-nine	" "	.....	964 43
Thirty	" "	.....	964 43

87 Making in all the sum of thirty-one thousand four hundred and eighty $\frac{75}{100}$ dollars ($31,480.75), for which amount, in instalments as above, promissory notes have been given by the lessees to the lessors.

It is further agreed that time shall be of the essence of this contract and shall not be relievable against in equity or at law.

It is further agreed that if at any time the lessees shall *shall* make any default in performance of any of their undertakin-s herein entered into, or shall fail to pay said rent as it matures or having paid said rent, shall fail within the time limited above to purchase and pay for said locomotives, then said lessors may, at their option, without demand first made, repossess themselves of said four locomotives and hold the same discharged from any further liability hereunder, and from lessees' option to purchase and shall be entitled to hold and retain all rent theretofore paid to them, and to recover forthwith from the lessees rent at the rate aforesaid up to the time of such repossession, together with damages to be ascertained by arbitration as above, in case of injury to said locomotives, and with damages, in addition, for breech of agreement; which last damages shall be ascertained and liquidated by charging the lessees with rent, as above, from date of such repossession to the end of this term, as if the same was then actually due and payable and by allowing them a credit, less expenses of two-thirds of the actual value at that time of the locomotives thus repossessed.

After the lessee- shall have faithfully performed all the stipulations of this contract, in manner and form as is herein provided, without default, and shall have reimbursed all outlays, as aforesaid, for insurance, then it is agreed that the lessees may, at their option, at any time within one month after the time of maturity as above of the last instalment of rent, purchase said six locomotives at the price of one dollar, and upon the payment of said sum to them, the

lessors shall thereupon, by bill of sale convey said six locomotives to said lessees.

Nothing herein contained, and no action hereunder, shall divest the title of the lessors to said four locomotives until the rents above enumerated and the purchase-money, with insurance
88 premiums above named, shall have been fully paid by said lessees, and until a bill of sale therefore shall have been delivered until after such payment and delivery, the said four locomotives shall remain the property of the lessors, and no right whatever thereto shall pass to the lessees excepting that of using the same in strict compliance with the terms of this contract.

It is agreed that the lessors may vest in an assignee or assignees all the rights and privileges hereby reserved to them.

Executed in duplicate the day and year above written.

BURNHAM, PARRY, WILLIAMS & CO.
THE KANAWHA AND OHIO RAILWAY CO.,
By ERWIN DAVIS, *President.*

Witnesses:
JOSEPH MACFANAN.

89 EXHIBIT "C."

Agreement for Sale of Railroad Rolling Stock.

Agreement, made this twenty-seventh day of December, A. D. 1886, between Pullman's Palace Car Company and the Kanawha and Ohio Railway Company,

Witnesseth, that Pullman's Palace Car Co. as vendor, will, upon the payments being made and the terms and consitions being performed, herein named, sell and convey to the Kanawha and Ohio Railway Company, as vendee, the railroad rolling stock and equipment to be built according to specifications furnished, described and at the agreed price named, as follows:

No. of cars.	Description.	R. R. Nos.	Pr. of car.	Total price.
100	25-ton box cars.....	500 to 599	$485 00	$48,500 00
150	25-ton gondola cars.....	2000 to 2149	396 00	59,400 00
64	15-ton gondola cars.....	1935 to 1999	325 00	20,800 00
				$128,700 00

Payments are to be made and terms and conditions performed by the vendee, as follows: A cash payment of 25 per cent. of the agreed price of such railroad rolling stock and equipment, or any part thereof before the delivery of the same, making an aggregate cash payment of thirty-two thousand one hundred and seventy-five $\frac{00}{100}$ ($32,175.00). In addition to such cash payment 36 consecutive monthly payments of twenty-nine hundred and eighty $\frac{41}{100}$ dollars, ($2,980.41) each on the first day of each and every month from

April 1st, 1887, to March 1st, 1890, both inclusive, making an aggregate of deferred payments including interest computed
90 thereon of one hundred and seven thousand two hundred and ninety-four $\frac{76}{100}$ dollars ($107,294.76); each of such deferred payments shall be represented by the promissory note of the vendee bearing interest at the rate of 7 per cent. per annum from maturity until paid.

As such railroad rolling stock and equipment shall be completed, the same to be delivered to the vendee or to such person as may be authorized by it to receive the same; the receipt of the vendee or such person, for such railroad rolling stock and equipment or any part thereof, to be final and conclusive evidence that the same has been built according to such specifications and is, accordingly, satisfactory to the vendee and will be accepted by it when sold and conveyed to it as herein provided.

The possession of such railroad rolling stock and equipment, or any part thereof, by the vendee under this agreement, is not to be considered, claimed or held to be evidence of ownership, but on the contrary, it is hereby expressly stipulated and agreed that the title to and ownership in such railroad rolling stock and equipment, is to remain in the vendor until all the payments herein provided for are made and all the terms and conditions herein named are performed on the part of the vendee.

In case of default in any one or more of the payments to be made or the terms and conditions to be performed by the vendee, as herein provided, the vendor shall have the right to declare this agreement terminated; to retain all moneys paid thereunder; to enter upon the premises of the vendee and take possession of and remove all such railroad rolling stock and equipment, as may have been delivered in pursuance hereof, to sell the same upon ten days' printed or written notice at public or private sale; to apply the proceeds of such sale to the payment of the unpaid part of
91 the *of the* agreed price therefor, whether all the instalments thereof shall be due or not. The vendor or the vendee to have the right to purchase such railroad rolling stock and equipment at such sale. Should the proceeds of the sale of such railroad rolling stock and equipment be more than sufficient to pa*te* the amount of the agreed price, remaining unpaid, together with interests, costs and expenses, the residue to be paid to the vendee; but if the proceed- of such sale shall be insufficient to pay the agreed price remaining unpaid with interests, costs and expenses, then the vendee to be liable to the vendor for the payment of the amount so remaining unpaid and the unpaid promissory note or notes given for the same by the vendee shall remain in full force and effect as to such unpaid amount.

The vendee shall at all times keep such railroad rolling stock and equipment in good order and repair less ordinary wear and tear.

Proper plates or marks of the ownership by the vendor of such railroad rolling stock and equipment shall be fixed thereon by the vendor before delivery and shall be thereafter, at all times maintained thereon by the vendee, and in case such plates or marks of owner-

ship shall be removed or destroyed the vendee to immediately restore or replace the same, and to do such other and further acts and things as may be necessary and proper to be done for the full and complete protection of the vendor's rights herein.

The railroad rolling stock and equipment to be insured against loss by fire by the vendor, before delivery for the vendor's benefit, the insurance premiums to be paid in cash by the vendee.

The vendee to repair, renew and replace any of such railroad rolling stock and equipment that may be damaged or destroyed by fire or otherwise, and when so repaired, renewed and re-
92 placed *replaced* to receive from the vendor any amount collected from the insurance companies on account of such damage or loss by fire or otherwise.

The vendee to pay all taxes, assessments and charges of every nature and character whatever that may be assessed, levied or made against such railroad rolling stock and equipment, while in the possession of the vendee.

That in case all the payments shall be made, and all the terms and conditions shall be performed on the part of the vendee as herein provided, then and in that event, the title to such railroad rolling stock and equipment shall thereupon vest in and become the absolute property of the vendee.

In witness whereof, the parties hereto have signed sealed and delivered these presents the day and year first above written.

Executed in duplicate.

PULLMAN'S PALACE CAR COMPANY,
By GEO. M. PULLMAN, *President.*

Attest: A. S. WEINSHEIMER, *Secretary.*

[SEAL.] KANAWHA AND OHIO RAILWAY COMPANY,
By ERWIN DAVIS, *President.*

Attest: E. R. LELAND, *Sec'y.*

93 EXHIBIT "D."

This agreement, made this 14th day of October A. D. 1887 by and between Robert Seney, trustee of the city, county and State of New York, party of the first part, (hereinafter called the lessor) and the Kanawha and Ohio Railway Company, a corporation of the States of Ohio and West Virginia, party of the second part, (hereinafter called the lessee), witnesseth, as follows, to wit:

First. The lessor hereby leases to the lessee and the lessee hereby hires from the lessor, two hundred box cars of 25 tons capacity each, built by the Pullman Palace Car Co. and No. 600 to 799 inclusive, for the term of eight years from the first day of November A. D. one thousand eight hundred and eighty-seven.

Second. Said cars are to be built according to the specifications referred to in the contract therefor between the lessor and the Pullman Palace Car Company, to which specifications reference is here

had, and are to be subject -o the approval of an inspector agreed upon by the parties hereto. The said cars are to be delivered to the lessee at Pullman, Ill. at the times provided for the delivery thereof to the lessor, under his contract with the makers thereof, to which reference is here had, it being expressly agreed, that the lessor shall not be liable for any delay in the delivery thereof said cars or any of them, attributable to the makers thereof, but for any damages suffered by the lessee, by reason of such delay said lessee shall be entitled to all the benefits secured to the lessor by his contract with the makers and in respect thereof shall be subrogated
94 to all the rights and remedies of the lessor. The lessee shall be bound as from time to time said cars are completed and ready for delivery to have an agent at Pullman, with authority to receive and receipt for the said cars and the receipt of said agent shall be final and conclusive evidence of the acceptance by the lessee of the cars receipted for, and of their delivery to the lessee.

Third. The lessee agrees to pay to the lessor, or his assigns, at its financial agency, in the city of New York, as rent for said cars, the following, to wit:

I. The sum of fifty-five thousand one hundred and seventy dollars on the execution and delivery of this agreement the receipt of which is hereby acknowledged.

II. On the 1st day of November A. D. 1888, the sum of eight thousand dollars ($8,000).

On the 1st day of November A. D. 1889 the sum of $8,000.
On the 1st day of November A. D. 1890 the sum of $8,000.
On the 1st day of Nov. A. D. 1891 the sum of $8,000.
On the 1st day of Nov. A. D. 1892 the sum of $8,000.
On the 1st day of Nov. A. D. 1893 the sum of $8,000.00.
On the first day of Nov. A. D. 1894, the sum of $8,000.
On the 1st day of November A. D. 1895 the sum of $8,000.

III. On the first days of May and November in each year beginning with the first of May one thousand eight hundred and eighty-eight, a further sum equal to the half-yearly interest at the rate of seven per c-nt. per annum, on the total amount of said yearly payments of eight thousand dollars each, remaining unpaid.

The lessee further pr-mises and agrees to pay all taxes that may at any time, be levied or assessed upon said cars, or any of
95 them, or upon the o-ligations for rent hereby entered into by the lessee, as and when the same shall become due and payable.

Fourth. The lessee shall execute and deliver to the lessor, simultaneously with the delivery of the cars, its lithographed bonds for the principal sum in the aggregate of sixty-four thousand dollars as evidence of said yearly payments of eight thousand dollars each, which said bonds shall have coupons attached, representing the interest upon said yearly payments hereinbefore agreed to be paid by the lessee.

The said bonds (which shall be for one thousand dollars each) and the said coupons shall be substantially in the terms and form following, respectively, to wit:

UNITED STATES OF AMERICA, *States of Ohio and West Virginia.*

The Kanawha and Ohio Railway Company.

Seven per Cent. Equipment Bond.

No. —. Series A. $1,000.

For value received, the Kanawha and Ohio Railway Company promises to pay to the bearer one thousand dollars in gold coin of the United States, of the present standard of weight and fineness at its financial agency in the city of New York, on the first day of November, A. D. one thousand eight hundred and —, and on presentation and surrender of the annexed coupons, at the rate of seven per cent. per annum from the 1st day of November, A. D. one thousand eight hundred and eighty-seven, payable in like coin at said agency on the first day of May and November, in each year until such principal sum shall be paid.

This bond is one of a series of sixty-four bonds of like import and amount, known as the Kanawha and Ohio Railway
96 Company's equipment bonds, series A, which — for a term of eight years, of two hundred box cars, numbers 600 to 700 inclusive, under an agreement of lease bearing date the 14th day of October, A. D. 1887, between Robert Seney, trustee, and the said railway company, of which bonds eight become due and payable on Nov. 1st, A. D. one thousand eight hundred and eighty-eight, and eight on each first day of November thereafter, until all have become due and payable.

The said agreement provides that in case of default in the payment of any of the sums of money above specified, on the day when the same falls due, or in case the said railway company shall violate said agreement in any respect whatever, the trustee herein and his successors, shall have the right, at his or their option, to enter upon the premises of said railway company, and to remove therefrom any and all said cars which shall have been delivered to said railway company and to sell the same, at public or private sale, and apply the proceeds to the payment of said bond, and if there shall be any deficit, that the said railway company shall pay the same on demand.

It is further provided in said agreement, that said railway Co. shall at its own expenses, keep said cars in good repair and fully insured, any loss being payable to said trustee for the holders of said bonds.

In witness whereof, the said railway company has caused its corporate seal to be hereunto affixed, attested by its secretary and this bond to be signed by its president, the — day of October, A. D. 1887, and has hereto attached coupons with the name of its treasurer engraved thereon.

[SEAL.] THE KANAWHA AND OHIO RAILWAY COMPANY,

By —— ——, *President.*

97 Attest: —— ——, *Secretary.*

$35.00. *Coupon.* No. —.

The Kanawha and Ohio Railway Company, upon presentation and surrender of this coupon, will pay thirty-five dollars to the bearer, at its financial agency in the city of New York, on the first day of ——, A. D. 18—, being six months' interest on its equipment bond No. — of series A.

—— ——, *Treasurer.*

Fifth. The sum to be paid by the lessee as aforesaid semi-annually on the first days of May and November, in each year of the said term, shall be applied to the payment of such of the said coupons as shall mature and fall due on such days respectively, and shall be paid directly to the holders of such coupons, and such payment having been made, the coupons so paid shall be cancelled and surrendered to the lessee; and the said sum of eight thousand dollars to be paid by the lessee as aforesaid, on the first day of November, in each year during said term, shall be applied to the payment of such of the said bonds as shall mature and fall due on such days respectively, and shall be paid directly to the holders of such bonds, and, such payment having been made, the bonds so paid shall be cancelled and surrendered to the lessee.

98 Sixth. The lessee shall keep said cars in good repair and condition, and shall replace any car destroyed by a new one, with the same mark and number, such repair and maintenance to be done to the satisfaction of the lessor, or his agent or assignees. At all times the name, number, plate or mark or sign of the ownership of the lessee, to wit, "Robert Seney, trustee, owner," shall be affixed and retained upon each of said cars aforesaid, for the purpose of making the ownership thereof publicly known, and in the event of any such mark or sign being destroyed or removed, the lessee shall immediately restore the same. And the lessee expressly agrees not to cause or allow to be painted or marked upon any of said cars the name of any railway company unless and except with the addition of the word "lessee" wherever such name appears, in plain and conspicuous characters. And it is agreed that such other things shall be done as by counsel of the lessor shall be deemed necessary or expedient for the full and complete protection of his right in the said cars as the owner thereof.

Seventh. The lessee shall, at its own expense, keep the said cars insured against fire, to the amount of the unpaid rental and purchase-money due thereon or therefor, and the policies for such insurance shall provide in proper terms, that the loss, if any, shall be payable to the lessor, for the benefit of the holders of the said bonds and coupons, as his or their interest may appear, and the lessee shall replace any car destroyed or injured by fire, in which case the lessor shall pay to the lessee the amount of insurance collected for such loss. And, in case the lessee shall fail to insure the said cars, or any of them, or shall fail to pay the taxes

99 thereon, as and when the same shall become due and payable, as hereinbefore provided, the lessor may take out such insurance and pay such taxes, and charge the cost thereof to the

lessee, which charges shall be of the same rank with the principal and interest of the rental hereinbefore agreed to be paid, and enforceable, in case of default, in the manner set forth in clause ninth hereof for the enforcement of the payment of said rental.

Eighth. The lessor and his assigns, shall have the right at any time, during the said term, but not oftener than once in six months, to make an inspection of the said cars for the purpose of ascertaining their condition, and the lessee shall pay the costs of such inspections.

Ninth. In case of defauot in the payment of any instalment of rent, or interest thereon as hereinbefore provided, on the day on which the same falls due hereunder, or in case of failure on the part of the lessee to make any of the payments, or perform any of the agreements herein entered into by it, the lessor shall have the right to enter upon the premises of the lessee, and to remove therefrom any and all cars which shall have been delivered to the lessee hereunder and, with or without notice to sell the same at public or private sale, and apply the proceeds of such sale to the payment of any and all instalments of rent for said cars, for the whole of said term, whether said instalments shall then have fallen due or not, and notwithstanding that said cars shall have been taken possession of and removed and sold prior to the expiration of this lease. If the proceeds of such sale be more than sufficient to pay such unpaid instalments of rent, with interest to the time of sale, and expenses, and the other sums of money then due from the lessee to the lessor by the terms hereof, then the surpous shall be paid to the lessee, its successors or assigns, but if there be any deficit, the lessee shall, and hereby promises and agrees to, pay such deficit to the lessor on demand.

Tenth. And the lessee agrees, in case the lessor shall seize the said cars or any of them, for any violation of the provisions of this agreement, on deman- of the lessor, to place all of said cars so seized upon any of the side tracks, designated by the lessor and hold the same without use or charge, subject to the orde- of the lessor, or his agent, and on direction of the lessor but at the expense of the lessee, which are now held, owned or possessed by the lessor in respect to the said cars with the same effect as if this agreement had originally been made between such assignee and the lessee. And the lessor and any person or corporation to whom he may sell or assign said cars and this lease, and his rights, powers privileges and remedies thereunder, shall hold the same as trustee for the persons, firms and corporations who may from time to time become the holders of the bonds and coupons to be issued as hereinbefore provided.

In witness whereof, the said lessor has hereto set his hand and seal, and the said lessee has caused its corporate seal to be hereto affixed, attested by its secretary and these presents to be signed by its president the day and year first above written, these presents being executed in duplicate.

ROBERT SENEY, *Trustee.* [SEAL.]
KANAWHA AND OHIO R'Y CO.,
By NELSON ROBINSON, *Pres't.*

101 Signed, sealed, and delivered in presence of—
JOHN W. SIMPSON.
[SEAL.] WM. M. BARNUM.

The above is the true corporation seal of the Kanawha and Ohio Railway Company.
Teste: E. R. LELAND,
Secretary of the Kanawha and Ohio Railway Company.

THE MERCANTILE TRUST CO., Complainant,
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY, Defendant. } In Equity.

I have read the foregoing petition of Robert W. Kelley, receiver, and believe it is necessary and proper to issue certificates as is prayed for in said petition and consent to the issue of the same.
E. B. KNIGHT,
Solicitor for the Kanawha and Ohio Railway Company.

102 And afterwards, to wit, on the 13th day of March, in the year 1889, an order was made upon the order book of said court, clothed in the words and figures following, to wit:

O. B. A., page 106.

Now, on this 13th day of March, in the year 1889, comes Robert W. Kelley, heretofore by order of this court appointed receiver of the railway and property of the defendant railway Co., and files his petition herein for leave to pay certain claims for supplies, wages of employees, taxes, equipment, &c., and to borrow money therefor, and to issue his certificates of indebtedness for the money so borrowed; and also comes the complainant The Mercantile Trust Company, by Alexander & Green and Simpson, Thacher and Barnum, solicitors, and William W. Green and Thomas Thacher, its counsel, and the said receiver exhibits to the court his petition as aforesaid, and said petition coming on to be heard and the matter thereof having been fully presented to the court and argued by counsel, and the court being fully advised in the premises, and having determined that the averments of the said petition are true, and the defendant The Kanawha and Ohio Railway Company, by its solicitors Knight and Couch, having consented thereto, it is, upon consideration, ordered that the said Robert W. Kelley as receiver be, and hereby is, directed to pay the amount due as stated in said petition to the employees, clerks, &c., for services and labor heretofore rendered and performed—namely, the sum of twenty thousand and ninety-nine and $\frac{56}{100}$ dollars and also the amount due as stated
in said petition for supplies heretofore furnished to the de-
103 fendant railway company, namely, the sum of about nineteen thousand dollars and also the amounts due and to become d-e as stated in said petition for taxes on the railway and property of the defendant railway company, namely, the sum of twelve thousand four hundred and ninety-seven and $\frac{19}{100}$ dollars.

And it is further hereby ordered that the said Robert W. Kelley as such receiver be, and hereby is, directed and authorized to pay, as and when the same are or shall become due and payable, the amount due or to become due, as stated in said petition, for locomotive engines leased or purchased from Burnham, Parry, Williams & Co. under and by virtue of a contract therefor attached to said petition and marked "Exhibit A," being the sum, namely, of four thousand seven hundred and sixty-six and $\frac{88}{100}$ dollars ($4,766.88), and also the amounts due or to become due, as stated in said petition, for locomotives leased or purchased from Burnham, Parry, Williams & Co. under and by virtue of the contract attached to the said petition marked "Exhibit B," namely, the sum of five thousand seven hundred and eighty-six and $\frac{58}{100}$ dollars ($5,786.58), and also the amounts due or to become due on or before the 1st day of September next, as stated in said petition, for cars leased or purchased from the Pullman Palace Car Co. under and by virtue of the contract attached to said petition and marked "Exhibit C," namely, the sum of twenty thousand eight hundred and sixty-two and $\frac{87}{100}$ dollars ($20,862.87), and also the amount to become due on the first day of May next, as stated in said petition, for cars leased or purchased from the Pullman Palace Car Company under and by virtue of a contract to said petition attached and marked Exhibit "D," namely, the sum of one thousand nine hundred and sixty dollars ($1,960).

And it is further hereby ordered that the said Robert W. Kelley, as such receiver, be, and hereby is, authorized to bor-
104 row the money necessary to make the payments hereinbefore directed and authorized to be made, and for the money so borrowed to make and issue his certificates of indebtedness bearing interest from the date thereof until paid at the rate of six per cent. per annum, payable semi-annually on the first days of January and July in each year, and to sell and dispose of such certificates from time to time as the indebtedness hereinbefore directed and authorized to be paid shall mature and become payable at not less than the par value thereof, and if necessary to pay a commission of not exceeding two and $\frac{1}{2}$ per cent. of the face of such certificates for the negotiation thereof and to use the proceeds of such sale or sales in the payment of said indebtedness.

And it is further hereby ordered that said certificates of indebtedness be substantially in the form following, to wit:

"Kanawha and Ohio railway.

Receiver's Certificate of Indebtedness.

This is to certify that the undersigned, as receiver of the railroad and property covered by the first mortgage or deed of trust made by the Kanawha and Ohio Railway Company to the Mercantile Trust Company, trustee, but not personally, is indebted to the bearer hereof in the sum of — dollars and interest thereon from date until paid at the rate of six per cent. per annum, payable semi-annually on the first day- of January and July in each year.

This certificate is one of a series issued or to be issued under

authority and by virtue of an order of the circuit court of the United States for the southern district of Ohio, eastern division,
105 in a suit in which the said trust company, trus-, *eastern division, in a suit in which the said trust company, trustee,* is complainant and the said railway company is defendant, which order is dated the — day of March, A. D. 1889, and thereby the said certificates are declared to be a debt of the undersigned and his successors, as such receiver as aforesaid, *and his successors, as such receiver as aforesaid,* incurred for the benefit and protection of the mortgaged property in his possession and a lien thereon prior to the lien of the mortgage or deed of trust above mentioned.

This certificate is not to be valid until countersigned by —— ——, treasurer of the said receiver.

In witness whereof I, as such receiver, have signed this certificate this — day of ——, in the year 1889.

—— ——,
Receiver of the Kanawha & Ohio R'y Co.

Countersigned:
—— ——, *Treasurer.*"

And it is further hereby ordered, adjudged, and decreed that said certificates be, and they are hereby, made and declared to be a debt of the said Robert W. Kelley, as receiver of the railroad and property of the defendant railway company and his successors, as such receiver, incurred for the benefit and protection of the said railroad and other property in his hands and a lien prior to the lien of the mortgage or deed of trust, to foreclose which this suit is brought, on the railroad and other property covered by said mortgage or deed of trust; that the earnings of the said railway, after deducting the expenses of operating, maintaining, preserving, and keeping in repair the said railroad and other property and the expense
106 of the receivership herein, shall be applicable to the payment of principal and interest of the said certificates.

Provided, however, that this order shall not become operative, except as authorizing payment of taxes and the issue of certificates for that purpose, until the holders of all the bonds secured by the mortgage sought to be foreclosed herein shall have assented to the foregoing provisions thereof or until the further order of this court, but for the purpose of paying said taxes the authority herein given and the provisions hereof are in force forthwith.

Evidence of the assent of bondholders above provided for to be filed in court before issue of any certificates hereunder except those to provide for the payment of taxes as aforesaid.

And afterwards, to wit, on the 13th day of March, A. D. 1889, the following petition for instructions, &c., was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition of Receiver for Instructions.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant,
against
THE KANAWHA AND OHIO RAILWAY COMPANY, Defendant.
} In Equity.

107 *Petition of Receiver for Instructions.*

Now, on this day, comes Robert W. Kelley, receiver herein, and respectfully shows to this honorable court as follows:

1. That heretofore, under date of July 24th, 1886, the defendant railway company entered into an agreement with the Columbus, Hocking Valley and Toledo Railway Company for the use by the former of a part of the railroad of the latter extending from the city of Gallipolis, in the State of Ohio, to and into the city of Pomeroy, in the same State, a copy of which agreement is hereto attached and made a part hereof.

2. That said agreement has, since the making thereof, been duly performed and carried into effect by the parties thereto; that the use of the railroad covered thereby is necessary to the proper, efficient, and economical operation of the railroad of the defendant railway company, inasmuch as it connects the bridge across the Ohio river at Point Pleasant and that part of the railroad of the defendant railway company which lies in the State of West Virginia and which is about fifty-seven miles in length with that part of the railroad of the defendant railway company which lies in the State of Ohio, which is about 70 miles in length, and without the use of the railroad covered by said agreement it would be impossible to operate the two parts of the railroad of the defendant railway company except separately.

3. That it is the judgment of your petitioner, after careful examination, that the terms of the said agreement are as favorable and advantageous to the said defendant railway company as can be obtained from the said Columbus, Hocking Valley and Toledo Railway Company, and that to abandon the said agreement and
108 *and* the use of the railroad covered thereby would result in great inconvenience to the public and in great loss of earnings to the railroad now in charge of your petitioner as receiver under the order of this court.

4. That on the 20th day of February last, when your petitioner took possession as receiver of the railroad of the defendant railway company, there was due, though not then payable, from the said company to the Columbus, Hocking Valley and Toledo Railway Co., by the terms of said agreement, by way of rental for and as the defendant company's proportionate share of the expense of repairing and

maintaining the said railroad covered thereby, the sum of about $3,692.17, and that your petitioner is informed and believes that unless the said sum is paid when it shall become payable and the other payments required by said agreement are promptly met in accordance with the terms thereof he will be deprived of the use of the railroad covered thereby.

II. And your petitioner further respectfully shows to the court as follows, to wit:

1. That the easterly terminus of the railroad of the defendant railway company now in charge of your petitioner as receiver herein is at Broad street, in the city of Charleston, West Virginia, from which point the railroad of the Charleston and Gauley Railway Company, a corporation of the State of West Virginia, is constructed eastwardly along the bank of the Kanawha river for a distance of about five and ½ miles; that for some time past, at a point beyond its easterly terminus, the defendant railway company, jointly with the Chesapeake and Ohio Railroad Company, has owned and operated a transfer by boat across the Kanawha river, by means of which connection is made and traffic exchanged
109 with the Chesapeake and Ohio railroad; that the railroad of the defendant railway Co. connects with the said transfer by using the said Charleston and Gauley railroad, and has no other way of making such connection or procure it to be made in any other way.

2. That heretofore an agreement was duly authorized by the stockholders of the defendant railway company and also by the stockholders of the Charleston and Gauley Railway Company *and also by the stockholders of the Charleston and Gauley Railway Co.*, providing that the former should lease the railroad of the latter as rapidly as the same should be constructed and should pay as rental, in addition to the taxes thereon and the expenses of maintaining the same, an annual sum or rental equivalent to ten per cent. upon the actual cost thereof as finally determined by the certificate of the chief engineer of the lessee company; that although said agreement of lease has not been executed by the proper officers of the two companies, so much of the Charleston and Gauley railroad as is completed has been used and operated by the defendant railway company substantially upon the terms of the said agreement, and that since his appointment as receiver herein your petitioner has used and operated the said transfer and the said Charleston and Gauley railroad in connection with the railroad of the defendant railway company.

3. That the cost of maintaining said transfer is about five hundred dollars per month, and that there is now due in connection therewith for rent of transfer-boat the sum of $475, one-half of which is receivable from the Chesapeake and Ohio Railway Company.

That the rental paid by the defendant railway company for the use of the said Charleston and Gauley railroad, computed in
110 accordance *in accordance* with the terms of said agreement, has been the sum of about eleven thousand five hundred dollars annually, which, until the appointment of your petitioner

as receiver, was paid monthly; that since such appointment the officers of the Charleston and Gauley Railway Company have offered to your petitioner to permit him, for the present, to use and operate their said railroad and to accept as the annual rental therefor, in addition to the taxes and expenses of maintenance, a sum equivalent to six per cent. upon the actual cost thereof, payable monthly, in place of ten per cent. as provided by said agreement.

That the traffic obtained for the railroad of the defendant railway company by means of said transfer and the said Charleston and Gauley railroad is large and valuable, the receipts therefrom, as nearly as can be estimated by your petitioner after careful examination of the books and accounts of said company, having amounted during the last six months to the average sum of two thousand dollars per month.

4. That in the judgment of your petitioner the maintenance and -peration of said transfer and the continued use of said Charleston and Gauley railroad are necessary to the most efficient and profitable operation of the railroad of the defendant railway company, and that they cannot be abandoned without inconvenience to the public and serious loss in earnings to the railroad of the defendant railway company, and that the terms offered by the officers of said Charleston and Gauley Railway Company, as above stated, are extremely favorable to the defendant railway Co. and to your petitioner as receiver thereof.

Wherefore your petitioner prays the instructions of this court
111 in the premises, and that he be authorized to continue the use of that part of the railway of the Columbus, Hocking Valley and Toledo Railway Company covered by the said agreement hereto annexed, Exhibit A, in accordance with the terms of said agreement, and to perform said agreement on the part of the defendant railway company, and to pay the sum now due thereunder when the same shall become payable, and that he be further authorized to continue the use of the railroad of the Charleston and Gauley Railway Company as lessee in accordance with the terms of the contract aforesaid as modified by the offer of the officers of the said railway company above mentioned, and to maintain said transfer and to pay the said sum of $475 now due in connection therewith.

And your petitioner will ever pray, &c.

ROBERT W. KELLEY, *Receiver.*

STATE OF ——, }
County of ——. }

Robert W. Kelley, being first duly sworn, upon his oath states that the several matters and things set forth in the above and foregoing petition are true to the best of his knowledge and belief.

ROBERT W. KELLEY.

Subscribed and sworn to before me this 12th day of March, 1889.

WALTER S. MARSHA,
Clerk U. S. Circuit Court, East. Dist. of Mich. [SEAL.]

112 EXHIBIT A.

Agreement made this 24th day of July, 1886, between the Columbus, Hocking Valley and Toledo Railway Company, a corporation organized and existing under the laws of the State of Ohio, party of the first part and the Kanawha and Ohio Railway Company a corporation organized and existing under the laws of the States of Ohio and West Virginia, party of the second part,

Witnesseth, that in consideration of the premises and of one dollar by each of the parties hereto paid to the other party the receipt of which is hereby aeknowledged the parties hereto have agreed, and do hereby agree as follows:

First. It is agreed by and between the parties hereto that the party of the second part its successors and assigns, shall have the right for ninety years from the first day of August, 1886, renewable forever, subject to the limitations and restrictions hereinafter expressed to use in common with the party of the first part that part of the railroad of the party of the first part from within the city of Gallipolis to and into the city of Pomeroy, including the main tracks, sidings, passenger and freight stations, Y's inclines and other appurtenances and terminal and station facilities connected therewith; also that part of the railroad of the party of the first part from the point at which the railroad of the party of the second part crosses and joins the railroad of the party of the first part, about one mile west of the city of Athens, to the station and terminous of the party of the first part in the city of Athens including

113 the main track, sidings, passenger and freight stations, turntables and all other appurtenances and terminal and station facilities belonging to the party of the first part in the city of Athens, for the transportation of passengers and freight and other ordinary railroad business furnishing its own motive power and rolling stock, fuel, train supplies and train attendance; that the movement of all trains over the said railroad of the party of the first part and the use of station buildings and other structures shall be under the supervision and control of the operating department of the party of the first part during the continuance of this agreement; but the business shall be so conducted that each party shall have equal rights in the operation of said railway so operated in common, and equal despatch in the movement of all its trains, passenger trains, however to have preference over freight and other trains. And that the party of the second part shall pay to the party of the *of the* first part, its successors or assigns, for the use thereof the sum of ten thousand dollars in each and every year during the terms aforesaid, in quarterly installments, to be paid on the first day of November, 1886, and the first days of February, May, August and November in every year thereafter, during said term.

The object of this grant and lease is to enable the party of the second part to make a continuous line of railway between the portions of its railroad in Ohio and the portion in West Virginia, and

also enable it to operate its trains between Gallipolis and points on its own line, and between Pomeroy and points on its own line; and the party of the second part shall have no right to take any business from or to any station upon the line of the railway of the first party except Athens, for any point reached by the railroad of the said first party or its connection.

114 Second. It is further agreed by and between the parties hereto, that the party of the first part shall maintain its said railroad, railroad bridges, buildings and structures, so as to be used as aforesaid by the party of the second part, in good and suitable repair for use and operation as aforesaid and shall render to the party of the second part quarterly statements of all monies expended by it, for the purpose of keeping the same in repair as aforesaid, and that the party of the second part, within 30 days after receiving said quarterly statements respectively shall pay to the party of the first part such portion of the expense of such repair and maintenance as shall bear the same ratio to the whole of such expense as the wheelage of the said party of the second part upon the railroad to be used in common as aforesaid bears to the entire wheelage thereon and for the purpose of determining the proportionate amount of the expense of such repair and maintenance to be born- by the parties hereto respectively, each party shall render to the other party monthly statements showing its own wheelage thereon.

Third. It is further agreed by and between the parties hereto that the party of the second part its successors or assigns shall, as between the parties hereto, their successors and assigns be solely responsible for all accidents, injuries and damages caused by its own negligence or the negligence of its employees in running its trains on or over said railroad or in using said railroad or any part thereof or which shall be caused in any way by its trains or equipment, or by its failure, to keep its equipment properly manned and in repair and shall, upon notice thereof, defend all actions, that may be brought against the party of the first part by reason of such accident,

115 injuries and damages and shall pay all amounts as shall be recovered in any such actions.

Fourth. It is hereby further agreed by and between the parties hereto that if default shall be made in the payment of any installment of the rental or consideration hereinbefore agreed to be paid by the party of the second part, in accordance with the terms of this agreement and such default shall continue for thirty days after the payment of such installment shall have been duly demanded or in case such demand is not practicable, then for thirty days after the time for the payment of such installment according to the terms hereof, or in case the party of the second part shall — made default in payment of its proportion of expense and maintenance, and such default shall continue for sixty days, then at the election of the party of the first part, the right of the party of the second part to use any of the railroad aforesaid as herein provided shall at once cease and determine and the party of the second part shall forthwith remove any and all of its equipment from the said railroad; and in default of its doing so, the party of the first part — have the right at

once to remove the same, and the party of the second part shall pay to the party of the first part any and all expenses incurred by the latter in such removal; or at its option, in case of any of the defaults aforesaid, the party of the first part may close its switches against the party of the second part and prevent any use of said leasehold property by it so long as the default of payment shall continue, without in any way diminishing the obligation of said second party to pay rent according to the terms thereof.

Fifth. It is further agreed by and between the parties hereto that in case of any difference between said parties in respect to
116 schedules of time or regulations or in respect to the amount or proportionate part of expense of maintenance and repair, or in respect to any other matter or thing under the provisions of this agreement, whether distinctly specified herein or not, such difference or disagreement shall, within ten days after notice in writing from one party to the other, be submitted to arbitration as follows: the party receiving such notice shall within five days thereafter appoint one of the board of arbitrators and the party giving such notice shall within five days after giving the same, appoint another of said board of arbitrators, and in case of disagreement they two shall choose a third, and the decision in writing of the majority of said board shall be final and binding on the parties hereto and there shall be no appeal therefrom. In case either of the parties hereto, after notice given as aforesaid, fail so to appoint a person to act as arbitrator and within the time aforesaid, then the other party hereto may, *within the time aforesaid, then the other party hereto may*, within five days thereafter, appoint the second arbitrator also, and they two shall, in case of disagreement, choose a third, and the decision in writing of any two thus appointed or chosed shall be final and binding upon the parties hereto, and there shall be no appeal therefrom. In case of the failure of such arbitrators to render their decision within twenty days after the appointment of two arbitrators in either manner aforesaid, either party may elect at any time before such decision is made to end the arbitration, and in such case shall have the right upon giving the notice aforesaid, to have the difference or disagreement submitted to a new arbitrator in the manner hereinbefore specified.

117 In witness whereof, the parties hereto have caused their corporate seals to be hereto affixed and attested by their respective secretaries and the signatures of their respective presidents to be hereto affixed the day and year first herein written.

—— ——.
—— ——.

—— ——.
—— ——.

STATE OF ——, }
County of ——, } *ss:*

Be it remembered that on this — day of ——, in the year 1886, before me, the subscriber, a notary public in and for said county, personally came —— ——, known to me to be the secretary of the

Columbus, Hocking Valley and Toledo Railway Company, the corporation described in and which executed the foregoing instrument, who, being by me duly sworn, did depose and say that he resided in ——; that he is the secretary of the Columbus, Hocking Valley and Toledo Railway Company and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the corporate seal of the said company and was thereto affixed by the board of directors of the said company, and that he signed his name thereto by the like order as secretary of said company; and the deponent further said that he is acquainted with —— —— and knows him to be the president of said company; that the signature of
118 the said —— —— *that the signature of the said* subscribed to the foregoing instrument is in the genuine handwriting of the said —— —— and was thereto subscribed by the like order of the said board of directors and in the presence of said deponent.

In witness whereof I have hereunto set my hand and notarial seal this — day of ——, in the year 1886.

—— ——.

STATE OF ——, } *ss:*
County of ——, }

Be it remembered that on this — day of ——, in the year 1886, before me, the subscriber, a notary public in and for said county, personally came —— ——, the president, and —— ——, the secretary, of the Columbus, Hocking Valley and Toledo Railway Company, the corporation which executed the foregoing instrument, and whose names are signed to the foregoing writing, bearing date on the 24th day of July, 1886, and acknowledged the signing of the foregoing instrument to be the act and deed of the said corporation for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my notarial seal this — day of ——, in the year 1886.

—— ——.

119 STATE OF NEW YORK, } *ss:*
County of New York, }

Be it remembered that on this — day of ——, in the year 1886, before me, the subscriber, a notary public in and for said city & county, personally came —— ——, known to me to be the secretary of the Kanawha and Ohio Railway Company, the corporation described in and which executed the foregoing instrument, who, being by me first duly sworn, did depose and say that he resides in ——; that he is the secretary of the Kanawha and Ohio Railway Company and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the corporate seal of the said company and was thereto affixed by order of the board of directors of the said company, and that he signed his name thereto by the like order as secretary of said company; and the deponent further said that he is acquainted with Erwin Davis and knows him to be the president

of said company; that the signature of the said *that the signa-*
120 *ture of the said* Erwin Davis subscribed to the foregoing instrument is in the genuine handwriting of the said Erwin Davis and was thereto subscribed by the like order of the said board of directors and in the presence of said deponent.

In witness whereof I have hereunto set my hand and notarial seal this — day of ——, in the year 1886.

—— ——.

STATE OF N. Y., }
County of New York, } *ss:*

Be it remembered that on this — day of ——, in the year 0886, before me, the subscriber, a notary public in and for said city & county, personally came Erwin Davis, the president, and —— ——, the secretary, of the Kanawha and Ohio Railway Company, the corporation which executed the foregoing instrument, and whose names are signed to the foregoing writing, bearing date on the 24th day of July, 1886, and acknowledged the signing of the foregoing instrument to be the act and deed of the said corporation for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my notarial seal this — day of ——, in the year 1886.

—— ——.

121 And afterwards, to wit, on the 13th day of March, A. D. 1889, an order was made upon the order book of said court clothed in the words and figures following, to wit:

O. B. A, p. 109.

Now, on this 13th day of March, 1889, comes Robert W. Kelley, receiver, and files his petition herein for instructions with respect to the agreement between the Columbus, Hocking Valley and Toledo Railway Company and the Kanawha and Ohio Railway Company, dated July 24, 1886, a copy of which is attached to said petition, and also with respect to proposed use of part of the road of the Charleston and Gauley Railroad Company and a transfer across the Kanawha river; and, the petition having been considered and the court being advised in the premises—

It is ordered that the receiver be, and he is hereby, authorized to continue the use of that part of the railway of the Columbus, Hocking Valley and Toledo Railway Company covered by the said agreement of July 24, 1886, in accordance with the terms thereof, performing the obligations therein assumed by the Kanawha and Ohio Railway Company.

And it is further ordered that, with respect to the other matters mentioned in said petition, the said petition is referred to the district court of the United States for the district of West Virginia, and the said receiver is ordered to follow the instructions which may be given in respect thereto by said court.

Approved.

HOWELL E. JACKSON,
Circuit Judge.

122 And afterwards, to wit, on the 6th day of June, A. D. 1889, the following petition was filed in the clerk's office of said court clothed in the words and figures following, to wit:

Petition of Atlantic Trust Company.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY OF NEW YORK
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY. } In Equity.

To the judges of the circuit court for the southern district of Ohio:

The petition of the Atlantic Trust Company of New York respectfully shows that it is a corporation duly organized and existing under and pursuant to the laws of the State of New York; that heretofore the Kanawha and Ohio Railway Company, therein called the lessee, duly made an agreement under seal to and with Robert Seney, trustee, of the city, county, and State of New York, therein called the lessor, dated the 14th day of October, 1887; that by the terms of said agreement said lessor thereby leased to the lessee
123 and the lessee hired thereby from the lessor two hundred box cars built by the Pullman Palace Car Company and numbered 600 to 799, inclusive, for the term of eight years from the 1st day of November, A. D. one thousand eight hundred and eighty-seven.

That the said lessee also agreed therein to pay to the lessor or his assigns at its financial agency in the city of New York, as rent for said cars, certain sums of money, to wit: On the execution and delivery of said lease the sum of $55,170, and on the 1st day of November, 1888, the sum of $8,000, and thereafter the sum of $8,000 on the 1st days of November, 1889, 1890, 1891, 1892, 1893, 1894, and 1895, and on the 1st days of May and November in each year beginning with the 1st day of May, 1888, a further sum equal to the half-yearly interest, at the rate of 7 % per cent. per annum, on the total amount of said yearly payments remaining unpaid.

That as evidence of its liability to pay said installments and the interest thereon the said lessee agreed to execute and deliver to the lessor simultaneously with the delivery of said cars its bonds for the principal sum in the aggregate of $64,000, payable in installments as above set forth, at said financial agency, having coupons attached payable semi-annually, at said financial agency, representing the interest agreed to be paid.

Said agreement further provided that the said sum so to be paid as interest semi-annually should be applied to the payment of the coupons then maturing, and that the instalments for principal should be applied to the payment of the bonds maturing on the 1st day of November in each year respectively.

It was further therein provided that in case of default in payment

of any instalment of rent or interest on the day when the same
124 should fall due, or in case of failure on the part of the *of the*
lessee to make any payments that might be due for taxes or for insurance premiums on said cars, or to perform any of the agreements therein entered into by it, the lessor should have the right to enter upon the premises of the said railway company and remove therefrom any and all cars which should have been delivered to it, and with or without notice to sell and to apply the proceeds to the payment of any and all installments of rent for said cars for the whole of said term, whether said installments should then have fallen due or not and notwithstanding the said cars rented had been taken possession of and sold prior to the expiration of the said agreement.

It was further agreed that in case the said railway company, lessee, should pay all sums co-enanted to be paid by it in said lease and should perform the stipulations thereof on its parts and should further pay the lessor — his successors within 30 days after the expiration of said terms, then and in that case said cars should become and be the absolute property of the lessee without further act of transfer from the lessor, but that until all the sums therein agreed to be paid by the lessor should be duly paid, together with the further payment of ten cents per car, the said cars should remain the property of the lessor, his successor and assigns, and that no right whatever thereto should pass to the lessee except that of using the same under said lease.

It was further therein provided that the lessor might at any time assign and convey his interest in said cars and said agreement of lease and his powers, rights, privileges, and remedies thereunder, and that any such sale and assignment should vest in the assignee
all the property, rights, powers, and remedies then held by
125 the said assigner and lessor, but that the said lessor and any
persons or corporations to whom he might sell or assign said cars and his rights, powers, privileges, and remedies thereunder should hold the same as trustee for the persons, firms, and corporations who might from time to time become the holders of bonds and coupons to be issued as therein provided.

Your petitioner further shows that simultaneously with or shortly after the time of the execution of the said lease the said Robert Seney delivered to the said railway company 200 box cars, numbered from 600 to 799, inclusive, and that said cars were delivered upon the approval of the said Seney and the said railway company and were taken possession of by said railway company and have been since that time and up to the present time continuously in use by it.

That in consideration of the delivery of said cars and as rent therefor the railway company executed and delivered to the said Seney, trustee, its bonds for the principal sum of $64,000 as evidence of said yearly payments of $8,000 each, with coupons attached representing the semi-annual interest thereon, as hereinabove set forth.

That by the terms of each of said bonds the said railway com-

pany promised to pay to the bearer one thousand dollars in United States gold coin of the then standard of weight and fineness at its financial agency in the city of New York and to pay the coupons attached thereto for interest at the rate of 7 % per annum on said bonds upon presentation of said coupons at said agency in the city of New York on the first days of May and November in each year until the principal sums evidenced by said bonds respectively should be paid.

That by the terms of said bonds eight thereof matured annually, to wit, on the 1st days of November, 1888, 1889, 1890,
126 1891, 1892, 1893, 1894, and 1895.

That since the issue thereof said bonds have been sold upon the market and have been bought and are now held and borne by the holders or holder for value, and that fifty-six of said bonds, each for the principal sum of one thousand dollars, together with all the coupons belonging thereto maturing on and after May 1st, 1889, are outstanding and unpaid.

That by an instrument of assignment dated the 8th day of May, 1888, Robert Seney, the trustee in said agreement of lease named, in consideration of the premises and of one dollar to him in hand paid by your petitioner, sold, assigned, and transferred his interest in said cars and in said agreement of lease and his rights, powers, privileges, and remedies thereunder unto your petitioner, its successors and assigns forever, intending thereby to invest in your petitioner all the property, rights, powers, privileges, and remedies then held, owned, or possessed by the said Seney in respect to the said cars with the same effect as if said agreement had originally been made between your petitioner and the said railway company, your petitioner holding the same as trustee for the holders and bearers of said bonds as in said agreement provided; that copies of said lease and said assignment are hereto annexed, marked Exhibits A and B.

127 Your petitioner further says that on or shortly after the 1st day of May, 1889, coupons or interest warrants belonging to the aforesaid 56 of the said bonds, and which matured on that day, and which coupons amounted to the sum of $1,960, were presented to the financial agency of said lessee in the city of New York for payment, and payment thereof was duly demanded and tender was made of the said coupons for cancellation; but that the same were not paid, nor any part thereof, and, as your petitioner is informed and charges, the said railway company was at that time insolvent and had not made any provision whatsoever for the payment of the said coupons.

Your petitioner further alleges that the said two hundred cars are now in the charge and custody of this honorable court and are controlled and operated by its receiver, who was heretofore duly appointed, and who as such receiver is for the time being the successor of said railway company, lessee.

That demand has been made upon the said receiver for the payment of the said amount of interest in arrear; but that the same has not been paid, and that like demand has been made upon him

for delivery to your petitioner of the said cars so leased, but delivery thereof has not been made.

128 Wherefore your petitioner prays that the said receiver may be ordered by this court to pay to your petitioner the amount of coupons now in arrear and unpaid, or that he may be directed to deliver unto you- petitioner the said cars so leased, and that your petitioner may have such other and further relief as may be just.

THE ATLANTIC TRUST COMPANY
OF NEW YORK,
By W. H. MALE, *President.*

Attest: J. D. FOWLER, *Sec'y.*

EARNHART, HUNTER & BUTLER,
No. 5 Wesley Block, Columbus, O.
JOHNSON, GALLUP & HURRY,
Solicitors for Petitioner, 58 William St., New York.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

W. H. Male, being duly sworn, says that he is the president of the said petitioner above named; that the allegations in the foregoing petition are true to the best of deponent's knowledge, information, and belief.

J. LYNCH PENDERGAST,
Notary Public, New York Co. (103) [SEAL.]

129 EXHIBIT "A."

This agreement, made this 14th day of October, A. D. 1887, by and between Robert Seney, trustee, of the city, county, and State of New York, party of the first part (hereinafter called the lessor), and the Kanawha and Ohio Railway Company, a corporation of the States of Ohio and West Virginia, party of the second part (hereinafter called the lessee)—

Witnesseth as follows, to wit:

First. The lessor hereby leases to the lessee, and the lessee hereby hires from the lessor, two hundred box cars, of twenty-five tons capacity each, built by the Pullman Palace Car Company, and numbered from 600 to 799, inclusive, for the term of eight years from the first day of November, A. D. one thousand eight hundred and eighty-seven.

Second. Said cars are to be built according to the specifications referred to in the contract therefor between the lessor and the Pullman Palace Car Company, to which specifications reference is here had, and are to be subject to the approval of an inspector agreed upon by the parties hereto. The said cars are to be delivered to the lessee at Pullman, Illinois, at the times provided for the delivery thereof to the lessor under his contract with the makers thereof, to which reference is here had, it being expressly agreed that the

lessor shall not be liable for any delay in the delivery of said cars, or any of them, attributable to the makers thereof; but for any damages suffered by the lessee by reason of such delay said lessee shall be entitled to all the benefits secured to the lessor by
130 his contract with the makers, and in respect thereof shall be subrogated to all the rights and remedies of the lessor. The lessee shall be bound, as from time to time said cars are completed and ready for delivery, to have an agent at Pullman with authority to receive and receipt for the said cars, and the receipt of said agent shall be final and conclusive evidence of the acceptance by the lessee of the cars receipted for and of their delivery to the lessee.

Third. The lessee agrees to pay to the lessor or his assigns, at its financial agency in the city of New York, as rent for said cars, the following sums, to wit:

I. The sum of fifty-five thousand one hundred and seventy dollars on the execution and delivery of this agreement, the receipt of which is hereby acknowledged.

II. On the first day of Nov., A. D. 1888, the sum of eight thousand dollars ($8,000).

On the 1st day of Nov., A. D. 1889, the sum of $8,000.

On the 1st day of Nov., A. D. 1890, the sum of $8,000.

On the 1st day of November, A. D. 1891, the sum of $8,000.

On the 1st day of November, A. D. 1892, the sum of $8,000.

On the first day of Nov., A. D. 1893, the sum of $8,000.

On the 1st day of November, A. D. 1894, the sum of $8,000.

On the 1st day of November, A. D. 1895, the sum of $8,000.

III. On the first da-s of May and November in each year, beginning with the first day of May, one thousand eight hundred and eighty-eight, a further sum equal to the half-yearly interest at the rate of seven per cent. per annum on the total amount of said yearly payments of eight thousand dollars each remaining unpaid.
131 The lessee further promises and agrees to pay all taxes that may, at any time, be levied or assessed upon said cars, or any of them, or upon the obligations for rent hereby entered into by the lessee, as and when the same shall become due and payable.

Fourth. The lessee shall execute and deliver to the lessor, simultaneously with the delivery of the cars, its lithographed bonds for the principal sum in the aggregate of sixty-four thousand dollars, as evidence of said yearly payments of eight thousand dollars each, which said bonds shall have coupons attached, representing the interest upon said yearly payments hereinbefore agreed to be paid by the lessee.

The said bonds (which shall be for one thousand dollars each) and the said coupons, shall be substantially in the terms and form following respectively, to wit:

UNITED STATES OF AMERICA, *States of Ohio and West Virginia.*

The Kanawha and Ohio Railway Company.

Seven per Cent. Equipment Bond.

No. —. Series A. $1,000.

For value received, the Kanawha and Ohio Railway Company promises to pay to the bearer one thousand dollars in gold coin of the United States of the present standard of weight and fineness, at its financial agency in the city of New York, on the first day of November, A. D. one thousand eight hundred and —, and on presentation and surrender of the annexed coupons, as they shall severally become due, to pay interest thereon at the rate of seven per cent. per annum, from the first day of November A. D. one thousand eight hundred and eighty-seven, payable in like coin, at said agency on the first days of May and November, in
132 each year until such principal sum shall be paid.

This bond is one of a series of sixty-four bonds of like import and amount, known as the Kanawha and Ohio Railway Company's equipment bonds, series A, which with the coupons thereto attached, represent the rental, for a term of eight years, of two hundred box cars, number 600 to 799 inclusive, under an agreement of lease bearing date the 14th day of October A. D. 1887, between Robert Seney, trustee, and the said railway company, of which bonds eight become due and payable on November 1st, A. D. one thousand eight hundred and eighty-eight, and eight on each first day of November, thereafter, until all have become due and payable.

The said agreement provides, that in case of default in the payment of any of the sums of money above specified, on the day when the same falls due, or in case the said railway company shall violate said agreement in any respect whatever, the trustee herein, and his successors, shall have the right, at his or their option, to enter upon the premises of said railway company, and to remove therefrim any and all said cars, which shall have been delivered to said railway company and to sell the same, at public or private sale, and apply the proceeds to the payment of said bonds, and if there shall be any deficit, that the said railway Co. shall pay the same on demand.

It is further provided in said agreement, that said railway company shall, at its own expense, keep said cars in good repair, and fully insured any loss being payable to said trustee for the holders of said bonds.

In witness whereof, the said railway company has caused its corporate seal to be hereunto affixed, attested by its secretary, and this bond to be signed by its president the —'day of October A. D. 1887, and has hereto attached coupons with the name of its treasurer engraved thereon.

133 [SEAL.] THE KANAWHA AND OHIO RAILWAY COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

$35.00. *Coupon.* No. —.

The Kanawha and Ohio Railway Company upon presentation and surrender of this coupon, will pay thirty-five dollars to the bearer at its financial agency in the city of New York, on the 1st day of ——, A. D. 18—, being six months' interest on its equipment bond No. — of series A.

—— ——, *Treasurer.*

Fifth. The sums to be paid by the lessee as aforesaid semi-annually on the first days of May and November, in each year of the said term, shall be applied to the payment of such of the said coupons as shall mature and fall due on such days respectively and shall be paid directly to the holders of such coupons, and such payment having been made, the coupons so paid shall be cancelled and surrendered to the lessee; and the said sums of eight thousand dollars, to be paid by the lessee, as aforesaid on the first day of November, in each year during said term, shall be applied to the payment of such of the said bonds as shall mature and fall due on such days respectively, and shall be paid directly to the holders of
134 such bonds and such payment having been made, the bonds so paid shall be cancelled and surrendered to the lessee.

Sixth. The lessee shall keep said cars in good repair and condition, and shall replace any car destroyed by a new one, with the same mark and number, such repair and maintenance to be done to the satisfaction of the lessor, or his agent or assignees. At all times the name, number, plate or mark or sign of the ownership of the lessee to wit: "Robert Seney, trustee, owner," shall be fixed and retained upon each of said cars aforesaid, for the purpose of making the ownership thereof publicly known, and in the event of any such marks or signs, being destroyed or removed, the lessee shall immediately restore the same. And the lessee expressly agrees, not to cause to allow to be painted or marked upon any of said cars the name of any railway company, unless and except with the addition of the word "lessee" wherever such name appears, in plain and conspicuous characters. And it is agreed, that such other things shall be done as by counsel of the lessor shall be deemed necessary or expedient for the full and complete protection of his rights in the said cars as the owner thereof.

Seventh. The lessee shall, at its own expense, keep the said cars insured against fire, to the amount of the unpaid rental and purchase-money due thereon or therefor, and the policies for such insurance shall provide in proper terms that the loss, if any, shall be payable to the lessor for the benefit of the holders of the said bonds and coupons, as his or their interest may appear and the lessee shall replace any car destroyed or injured by fire, in which case the lessor shall pay to the lessee the amount of insurance collected for such loss. And, in case the lessee shall fail to insure the said cars, or any of them, or shall fail to pay the taxes thereon, as and when the same shall become due and payable, as hereinbefore pro-
135 vided, the lessor may take out such insurance and pay such taxes and charge the costs thereof to the lessee, which charges

shall be of the same rank with the princi-al and interest of the rental hereinbefore agreed to be paid, and enforceable, in case of default, in the manner set forth in clause ninth hereof for the enforcement of the payment of said rental.

Eighth. The lessor, and his assigns, shall have the right at any time, during the said term, but not oftener than once in six months, to make an inspection of the said cars for the purpose of ascertaining their condition, and the lessee shall pay the costs of such inspections.

Ninth. In case of default in the payment of any instalment of rent, or interest thereon as hereinbefore provided, on the day on which the same falls due hereunder, or in case of failure on the part of the lessee to make any of the payments or perform any of the agreements herein entered into by it, the lessor, shall have the right to enter upon the premises of the lessee, and to remove therefrom any and all cars which shall have been delivered to the lessee hereunder, and with or without notice, to sell the same at public or private sale, and apply the proceeds of such sale to the payment of any and all instalments of rent for said cars for the whole of said term, whether said instalment shall then have fallen due or not, and notwithstanding that said cars shall have been taken possession of and removed and sold prior to the expiration of this lease. If the proceeds of such sale be more than sufficient to pay such unpaid instalments of rent, with interest to the time of sale and expenses, and the other sums of money then due from the lessee to the lessor by the terms hereof, then the surplus shall be paid to the lessee, its successors or assigns, but if there be any deficit, the lessee shall, and hereby promises and agrees to pay such deficit to the lessor on demand.

136 Tenth. And the lessee agrees, in case the lessor shall seize the said cars, or any of them, for any violation of the provisions of this agreement, on demand of the lessor, to place all of said cars so seized upon any of its side tracks designated by the lessor, and hold the same without use or charge, subject to the order of the lessor, or his agent, and, on direction of the lessor, and at the expense of the lessee, to transport such cars to any other point, designated by the lessor, whether on the line of railroad of the lessee, or elsewhere.

Eleventh. It is further hereby agreed that in case the lessee shall duly pay all the sums herein agreed to be paid by it, and perform the stipulations of this agreement on its part, and shall further pay the lessor his successors or assigns the sum of ten cents for each and every of said cars, within thirty days after the expiration of said term, then and in that case the said cars shall become and be the personal property of the lessee without any further act of transfer or conveyance from the lessor. But until all the sums herein agreed to be paid by the lessee shall have been duly paid and the further payment of ten cents per car shall have been duly made, the said cars shall remain the property of the lessor, his successors and assigns and no right whatever thereto shall pass to the

lessee, except that of using the same in strict compliance with the terms of this agreement.

Twelfth. The lessor may, at any time, sell and assign his interest in the said cars and this agreement of lease and his rights, powers, privileges and remedies thereunder, and any such sale and assignment shall vest in the assignee and the assignee shall have
137 and possess, all the property, rights, powers and remedies which are now held, owned or possessed by the lessor in respect to the said cars, with the same effect as if this agreement had originally been made between such assignee and the lessee.

And the lessor, and any person or corporation to whom he may sell or assign said cars, and this lease, and his rights, powers, privileges and remedies thereunder, shall hold the same as trustee for the persons, firms and corporations who may from time to time become the holders of the bonds and coupons to be issued as hereinbefore provided.

In witness whereof, the said lessor has hereto set his hand and seal and the said lessee has caused its corporate seal to be hereto affixed, attested by its secretary and these presents to be signed by its president, the day and year first above written, these presents being executed in duplicate.

ROBERT SENEY, *Trustee.* [SEAL.]
KANAWHA AND OHIO R'Y CO.,
[SEAL.] By NELSON ROBINSON, *President.*

Signed, sealed, and delivered in presence of—
JOHN W. SIMPSON.
WM. M. BARNUM.

The above is the true corporate seal of the Kanawha and Ohio Railroad Company.
Teste:
E. R. LELAND,
Sec'y of the Kanawha and Ohio R. R. Co.

Endorsed: Filed for record Oct. 25, 1887. J. S. Robinson, sec'y of state. Recorded in vol. 41, p. 240, of the Records of Incorporations. J. S. Robinson, sec'y of state.

138 EXHIBIT B.

Instrument made this eighth day of June, A. D. 1888, by and between Robert Seney, trustee, of the city, county, and State of New York, party of the first part, and the Atlantic Trust Company, a corporation organized under the laws of the State of New York, party of the second part.

Whereas, an agreement was heretofore made, dated the 14 day of October, 1887, by and between the party of the first part and the Kanawha and Ohio Railway Company, whereby the party of the first part leased to the said railway company, and the said railway company hired from the said party of the first part, two hundred box cars of twenty-five tons capacity each, built by the Pullman

Palace Car Company, and numbered from 600 to 799 inclusive, for the term of years therein stated, and under certain stipulations and agreements therein expressed, which agreement was on the 19th day of October, 1887, delivered to the secretary of state of the State of West Virginia in his office as such secretary of state, and admitted to record therein, being recorded in Corporation Book B, folio 384 *et seq.*; and

Whereas, said agreement provides for the issue by the said railroad company of certain bonds, with coupons attached as evidence of the yearly payments to be made by said railway company under said agreement and of the interest upon said yearly payments; and

Whereas, it is in said agreement provided, that the party of the first part, the lessor therein, may, at any time, sell and assign his interest in the said cars and said agreement of lease, and his rights, powers, privileges and remedies thereunder and that any such sale
139 and assignment shall vest in the assignee, and the assignee shall have and possess all the property, rights, powers and remedies held, owned or possessed by the said lessor in respect to the said cars, with the same effect as if this agreement had originally been made between such assignee and the said railway company, the lessee therein, and further provides, that the said lessor, or any person or corporation to whom he may sell or assign such cars and said lease, and his rights, powers, privileges and remedies thereunder, shall hold the same as trustee, for the persons, firms and corporations who may from time to time become the holders of the bonds and coupons to be issued as therein provided.

Now therefore, this instrument witnesseth:

That, in consideration of the premises and one dollar in hand paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged the party of the first part doth hereby sell and assign his interest in the said cars and said agreement of lease, and his rights, powers, privileges and remedies thereunder, unto the said party of the second part its successors and assigns, forever, intending hereby to vest in the party of the second part, all the property, rights, powers, privileges and remedies now held, owned or possessed by the party of the first part in respect to the said cars, with the same effect as if said agreement had originally been made between the said party of the second part and the said railway company, the said party of the second part to hold the same as trustee as in said agreement provided.

In witness whereof, the said party of the first part has hereto set his hand and seal the day and year first above written.

(S'd) ROBERT SENEY, *Trustee.* [L. S.]

140 Signed, sealed, and delivered in the presence of—

PHILIP G. BARTLETT.

This is to certify that the Kanawha and Ohio Railway Company takes note of and assents to the foregoing assignment.

Witness its corporate seal, attested by its secretary and the signature of its president, this — day of May, 1888.

KANAWHA AND OHIO RAILWAY COMPANY.

(S'd) ROBERT W. KELLEY, *Pres't.*

Attest:

(S'd) W. B. PALMER, *Sec'y.* [L. S.]

CITY AND COUNTY OF NEW YORK, *ss:*

On this eighth day of June, 1888, before me personally came *to me* Robert Seney, personally to me known and known to me to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

(S'd) PHILIP G. BARTLETT,
Notary Public, New York County.

141 And afterwards, to wit, on the 24th day of July, A. D. 1889, the following amended bill was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Amended Bill.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio, sitting in equity:

The Mercantile Trust Company, a corporation created by and existing under the laws of the State of New York and a citizen and resident of said State, and having its principal office for the transaction of business in the city of and State of New York, brings this its amended bill of complaint against the Kanawha and Ohio Railway Company, a corporation created by and existing under the laws of the States of Ohio and West Virginia (and a citizen and resident of said State of Ohio and West Va.), and having its principal office for the transaction of business in the State of Ohio in the city of Columbus, in said State, and in the State of West Virginia in the city of Charleston, in said State, and against the Toledo and Ohio Central Railway Company, a corporation created by and existing under the laws of the State of Ohio and citizen and resident of said State, and against the Shawnee and Muskingum River Railway Company, a corporation created by and existing under the laws of the State of Ohio and a citizen and resident of said State; and thereupon your orator complains and says:

142 I. That on and prior to the first day of May, in the *in the* year one thousand eight hundred and eighty-six, the Kanawha and Ohio Railway Company aforesaid was and ever since has been a body politic and corporate of that name and style, with all the powers, rights, privileges, and franchises and immunities granted by the laws of the State of Ohio and the laws of the State of West Virginia

to corporations formed under the laws of said respective States for the construction, operation, and maintenance of railroads in said States, and was the owner of and in possession of the railroad and property and held the rights and franchises mentioned in the mortgage or deed of trust hereinafter mentioned.

II. That the complainant, The Mercantile Trust Co., during the same time was and still is a corporation duly organized and existing under the laws of the State of New York, and having power under said laws to accept and execute such trusts as that created by the mortgage hereinafter mentioned.

III. That on or about the first day of May, in the year one thousand eight hundred and eighty-six, said The Kanawha and Ohio Railway Company duly made and executed its certain bonds, dated on that day, each for the payment to bearer, or, in case of registry, to the registered owner, of one thousand dollars in gold coin of the United States, of the then present standard of weight and fineness, at the office or agency of said company in the city of New York, on the first day of January, in the year one thousand nine hundred and thirty-six, and for the payment, on presentation and surrender of the annexed coupons as they should severally become due, of interest thereon at the rate of 6 per cent. per annum from the first day of July, 1886, until such principal should be paid, such interest being payable in like coin, at the office or agency, on the first days of January and July in each year, the said bonds and coupons
143 being in the forms shown in the mortgage hereinafter referred to.

IV. That, to secure the payment of the principal and interest of said bonds, the said The Kanawha and Ohio Railway Co., on or about the 1st day of May, one thousand eight hundred and eighty-six, duly made, executed, and delivered to the said The Mercantile Trust Company its certain mortgage or deed of trust, dated on that day, and thereby conveyed to the said The Mercantile Trust Company, as trustee, and its successors and assigns, the property and rights described as follows: All and singular the railroad of the said The Kanawha and Ohio Railway Company extending from a point in the village of Corning, in the township of Monroe, in the county of Perry, in the State of Ohio, through the counties of Perry and Athens, by way of Jacksonville, to a point within or near South Shawnee, in said county of Perry, and through or into the counties of Perry, Athens, Meigs, and Gallia, by way of Athens and Middleport, to a point on the Ohio river opposite the village of Point Pleasant, in the State of West Virginia, and thence across the Ohio river, and through the counties of Mason, Putnam, Kanawha, and Fayette, by way of Charleston, and, in general, along or near the northeasterly bank of the Kanawha river to a point at or near the mouth of the Gauley river, in said county of Fayette, in said State of West Virginia, constructed or to be constructed, and as the same then was or might thereafter be located, and whether then acquired or to be thereafter acquired, including all and singular the railroad, lands, and other property which were conveyed to the Ohio and Kanawha Railway Company by

Erwin Davis and Emily B., his wife *his wife*, by deed dated the 29th day of January, in the year one thousand eight hundred and eighty-six, and including also all and singular the railroad,
144 lands, and other property (except the coal *the coal* lands and mineral rights in Raleigh county) which were conveyed to the Kanawha and Ohio Railway Company, a corporation of the State of West Virginia, by the said Erwin Davis and Emily B., his wife; Albert Gallup, and Edward C. Homans and Francis E., his wife, by deed dated the 29th day of January, one thousand eight hundred and eighty-six.

And also all and singular the lands, tenements, and hereditaments, rights of way and easements, and all other interests in lands, including lands held or acquired for the purpose of depots, stations, terminals, or ferries, then held or thereafter acquired by said railway company in connection with said railroad or for the use thereof.

And also all letters patent, grants of land, and of land under water and of water rights, and all leaseholds, leases, terms and parts of terms, rights under leases or contracts, covenants or agreements, and all rights of trackage, terminal, bridge, and ferry rights, privileges and franchises, and all licenses, permits, and privileges from the Government of the U. S. or from the State of Ohio or the State of West Virginia or by any governmental or municipal authority, and all other rights or privileges, general or special, then held or thereafter acquired by said railway company for the purposes of said railroad or any part thereof.

And also all railways, tracks, sidings, spurs, turnouts, bridges, station-houses, depots, freight-houses, warehouses, elevators, round-houses, car-houses, storehouses, turn-tables, water tanks, machine shops and repair shops, and other structures, buildings, erections, and fixtures of every kind and nature whatsoever then held or which might thereafter be acquired by the said railway Co. for the uses and purposes of the said railway or in connection there-
145 with or in the business thereof.

And also all locomotives, engines, cars, and other rolling stock and railway equipment, and all ferry-boats, steamboats, tug-boats, floats, barges, and other floating equipment, and all tools, rails, ties, machinery, implements, fuel, and materials then held or which might thereafter be acquired for the uses or purposes of the said railway or in connection therewith or the business thereof.

And also all other property, real, personal, or mixed, then held or which might thereafter be acquired for the purposes of the said railway or for the use thereof or in connection with the construction, operation or maintenance, reparation or replacement of the said railway or any part thereof or as convenient or necessary for the uses or purposes thereof.

And also all rights, powers, privileges, and franchises connected with or relating to the said railway and other property, including the right to operate and maintain the said railway and other property, whether then held or thereafter acquired by the said railway company and connected with or relating to the said railway or for the uses or purposes thereof.

And also all improvements made or to be made to any or all of said railway, property, or estate by the said party of the first part or by others, and also all and every other estate, right, title, interest, property, or thing, right, privilege, or franchises which the said party of the first part then owned or held or which it might thereafter acquire or hold as necessary or convenient for the use, occupation, and enjoyment of said railway, rights, privileges, and franchises or any part or portion thereof.

146 And also all estate, right, title, and interest which the said railway company then had or might thereafter acquire of, in, or to the railway bridge across the Ohio river at Point Pleasant, in the State of West Virginia, and the railway and other property appurtenant thereto:

To have and to hold the premises, property, rights, and franchises and estates thereby conveyed or intended to be conveyed, with all and singular the reversions, remainders, tolls, rents, issues, profits, and appurtenances then or thereafter belonging or in anywise appertaining thereto, unto the said The Mercantile Trust Company and its successors and assigns and their heirs forever, in trust, nevertheless, for the persons, corporations, firms, and partnerships, and for the benefit, security, and protection of the persons, corporations, firms, and partnerships who should hold the bonds or interest coupons aforesaid or any or either of them, and for enforcing the payments thereof when payable, in accordance with the true intent and meaning of the stipulations of said deed of trust or mortgage, of said bonds and said interest coupons, and without any preference of any of said bonds over any of the others thereof by reason of priority in the time of the issue or negotiation thereof or otherwise howsoever.

Said conveyance being made subject, however, as to part of the said railroad, to the lien of certain mortgages, known as the Mineral Division mortgages, of the Ohio Central Railroad Company, therein described, it being therein provided, however, and said deed of trust or mortgage was expressed to be upon the express con- that if

147 the said The Kanawha and Ohio *and Ohio* Railway Company, its successors or assigns, should well and truly pay or cause to be paid the principal and interest to become due on the said bonds to be issued thereunder, at the times and in the manner stipulated in said bonds and in said interest coupons, according to the true intent and meaning thereof, and — the covenants, promises, and conditions in said bonds and in said deed of trust or mortgage expressed as to be kept, observed, and performed by or on the part of the said The Kanawha and Ohio Railway Company, then said mortgage or deed of trust and the estate and rights thereby granted should cease, determine, and be void; otherwise to be and remain in full force.

And the said Mercantile Trust Company accepted the trust created by said mortgage.

A copy of said mortgage or deed of trust is annexed to the original bill in this cause and marked "Exhibit A" and made a part of this bill.

V. That said mortgage or deed of trust was thereafter duly re-

corded in each of the counties through or into which the said railroad ran or in which was situated any part of said mortgaged property, the same being filed for record and admitted to record in each of said counties prior to the first day of August, 1886.

VI. That said mortgage or deed of trust of the said The Kanawha and Ohio Railway Company contains a covenant as follows:

"The railway company hereby covenants, promises, and agrees to and with the trustee that it will forthwith deliver or cause to be delivered to the trustee bonds and stock of the Point Pleasant
148 Bridge Co., representing, except as herein appears, the entire property in the railway bridge at Point Pleasant and the railway and other property appurtenant thereto not conveyed by these presents, which bonds and stock are delivered to and are to be held by the trustees as security for the equal payment, without preference, of the bonds to be issued as aforesaid in accordance with the true intent and meaning of the stipulations of this deed and of said bonds and interest coupons."

That the said railway bridge at Point Pleasant and its approaches is used as part of the line of road of the said The Kanawha and Ohio Railway Company connecting its railroad in West Virginia with its railroad in Ohio; that said bridge was at the date of the mortgage or deed of trust aforesaid subject to the lien of a certain mortgage or deed of trust made by Erwin Davis and wife and John W. Simpson, of the first part, to Alexander M. White, William Augustus White, and Alfred T. White, of the second part, dated Oct. 31, 1885, to secure the payment of two hundred thousand dollars and interest, but that this mortgage has since been paid and the lien thereof discharged.

That, in accordance with the covenants above recited and contained in said mortgage or deed of trust of the Kanawha and Ohio Railway Company, bonds of the said Point Pleasant Bridge Company for the principal sum in the aggregate of one million dollars, secured by mortgage of said bridge Co. to John W. Simpson, as trustee, and stock of said bridge company of the par value of nine hundred and ninety-eight thousand dollars, being all of its stock except two thousand dollars in par value thereof, and said bonds and stock representing, except for the said two thousand dollars of stock and the mortgage to said Alexander M. White and others, since
149 paid and discharged, the entire property in said railway bridge and the railway and other property appurtenant thereto, were on or about the 2d day of July, 1886, delivered to the complainant by Erwin Davis and John W. Simpson, to be held in accordance with said covenant and to be held and dealt with in accordance with a certain written agreement of that date, a copy of which is attached to the original bill in this cause and marked Exhibit B and made part of this bill, and said bonds and stock are still held by the complainant for such purpose.

VII. That of said bonds — the Kanawha and Ohio Railway Company there have been duly issued for value and in accordance with the provisions of said mortgage and are now outstanding eleven hundred and sixty bonds for the principal sum in the aggregate of

eleven hundred and sixty thousand dollars, besides which there are reserved by the trustee, this complainant, and withheld from issue in its custody and possession (except for the purpose of paying or retiring the bonds secured by said Mineral Division mortgages) one hundred and eleven of said bonds for the principal sum in the aggregate of one hundred and eleven thousand dollars.

VIII. That the issue of bonds and the execution and delivery of said mortgage or deed of trust by said The Kanawha and Ohio Railway Company for securing the payment thereof had before said execution and delivery been duly authorized and assented to by all the stockholders of the said The Kanawha and Ohio Railway Company and by the board of directors thereof.

IX. That on the first day of January, 1889, there became due and payable upon the said bonds of the Kanawha and Ohio Railway Company a semi-annual installment of interest, evidenced by the
150 interest warrants or coupons attached to said bonds, due on said last-mentioned date, amounting to the sum of $34,800; that since said first day of January, 1889, and prior to the commencement of this suit, seven hundred or more of said interest warrants or coupons due on that day, amounting to the sum of $21,000 or more, have been presented at the office or agency of the said The Kanawha and Ohio Railway Company in the city of New York, and payment thereof has been demanded and refused by said company, and said company has in this respect made default, and such default still continues, and the said The Kanawha and Ohio Railway Company has thus failed to pay interest on some of said bonds according to the stipulations of said bonds and the conditions and covenants of said mortgage or deed of trust and is in default in respect to said stipulations, conditions, and covenants.

And your orator further shows unto your honors that the said defendant railway company has a large floating debt, amounting to about $350,000, and that the said railway company is insolvent and unable to pay its floating debt and current and presently accruing indebtedness, and that suits and actions are threatened by the creditors of said corporation, and that there is great danger that the property of the defendant covered by the said indenture of mortgage or deed of trust or some part of it may be seized and attached under process issued either before or after judgment in said threatened suits, and that the property of the said defendant may thereby be separated, dissipated, and broken up and the value thereof destroyed or greatly impaired by the contest of creditors having conflicting claims.

That your orator is informed and has reason to believe that
151 there are now due and unpaid considerable sums of money for taxes which have been levied and assessed upon the property of said defendant by municipal and State authorities having authority to levy and assess — to pay, and that there is danger that some portion at least of the property of said railway company covered by said mortgage will be presently advertised and sold to meet the payment of such taxes so levied and assessed and in default.

That, as your orator is informed and has reason to believe, there is now due and will presently become due large amounts on account of labor, wages, and current expenses of said defendant, which said defendant is wholly unable to pay, and, as your orator is informed and believes, that the said mortgage- property is insufficient and inadequate security for the payment of the outstanding bonds secured by said indenture of mortgage or deed of trust.

And your orator further shows unto your honors that no proceedings at law have been had nor any action or suit commenced by or on behalf of your orator or any holder of the bonds of said company secured by the mortgage aforesaid for any principal or interest unpaid or accrued thereon except only this action.

And your orator further shows unto your honors that each of the defendants The Toledo and Ohio Central Railway Company and The Shawnee and Muskingum River Railway Company has or claims to have some interest in some part of the mortgaged property aforesaid, but that such interest was acquired subsequently to the making, execution, and delivery of the mortgage to your orator aforesaid, and to the issue, sale, and delivery of the said bonds secured thereby, and is subordinate, subject, and inferior to
152 the lien of the mortgage to your orator aforesaid.

In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of common law and is only relievable in a court of equity, where matters of this kind are properly recognizable and relievable—

Your orator therefore prays the aid of this honorable court, and that the said indenture of mortgage or deed of trust may be decreed to be a lien upon all property, real, personal, or mixed, rights, franchises, lands, titles, railroads of the Kanawha and Ohio Railway Company described in said mortgage or deed of trust, and that the said Kanawha and Ohio Railway Company may be decreed to pay unto your orator for the bondholders under aforesaid mortgage or deed of trust all arrears of interest now due or that may hereafter become due and payable upon said bonds, together with all costs and expenses in this behalf incurred and expended; and in default thereof that the defendants above named and each of them and all persons claiming under them or either of them may be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to the said mortgaged premises and every part and parcel thereof, and that all and singular the said mortgage mentioned may be sold as an entirety under decree of this honorable court, and that at the same time and with said mortgaged property and franchises be sold the bonds and stock of the said Point Pleasant Bridge Company now held by your orator as aforesaid, and that our of the moneys arising from the sale thereof, after deducting from the proceeds of any such sales just allowances for all disbursements and expenses of the said sale, including attorney's and counsel fees and the reasonable charges of your
153 orator for *for* services rendered as trustee and for all expenses incurred by it in the premises and all payments which may be made for taxes or assessments on the said premises or any

part thereof, the said proceeds be applied to the payment of such moneys due on the aforesaid bonds and coupons as may be at that time unpaid.

And your orator further prays that a receiver be forthwith appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, money, receipts, and earnings, rights, privileges, franchises, and immunities of the said railway company and of all other property included in and covered by the said mortgage, and that the defendants and each of them be decreed to make such transfer or conveyance to such receiver and to the purchasers of said property at any sale as aforesaid as may be necessary and proper to put them or either of them in possession and control of said property.

And your orator further prays that a writ of injunction issue out of and under the seal of this honorable court, or be issued by one of your honors, according to the practice of this court in such case, directing, commanding, enjoining, and restraining the said defendants and each of them and all other persons and each and every one of them from interfering with, transferring, selling, or disposing of any of the property mentioned in and covered by the said *attempting* or from taking possession of, levying upon, or attempting to sell, either by judicial process or otherwise, any portion of the property embraced in or covered by the said mortgage, and that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may re-

154 quire and to this honorable court shall seem meet.

And may it please your honors to grant unto your orator a subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said defendants, The Kanawha and Ohio Railway Company, The Toledo and Ohio Central Railway Company, and The Shawnee and Muskingum River Railway Co., therein and thereby commanding them and each of them, on a day certain therein to be named and under a certain penalty, to be and appear before this honorable court, then and there to answer (but not under oath, such oath being expressly waived) all and singular the premises, and to stand to, perform, and abide by such order, direction, and decree as may be made against them in the premises as shall seem meet and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, &c.

THE MERCANTILE TRUST COMPANY,
By ALEXANDER & GREEN.
SIMPSON, THATCHER & BARNUM,
Its Solicitors.

WILLIAM W. GREEN,
THATCHER & THATCHER,
Of Counsel.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

H. C. Deming, being duly sworn, says that he is the secretary of The Mercantile Trust Co., the complainant in the foregoing bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations therein contained as far as they relate to his own acts are true, and as far as
155 they relate to the acts of others he believes it to be true.

That in regard to all matters and things in the foregoing bill of complaint alleged which are not within the personal knowledge of this deponent, the deponent has been fully informed and he believes that the same are true.

H. C. DEMING.

Sworn to before me this 16th day of July, 1889.

GEORGE P. BARRETT,
[SEAL.] *Notary Public in N. Y. Co.*, # 26.

The Kanawha and Ohio Railway Company hereby consents to the filing of the within amended bill of complaint and waives the issuance and service of process thereon, and the clerk of the within-mentioned court is hereby instructed to enter the appearance of said company to said amended bill.

THE KANAWHA AND OHIO RAILWAY CO.,
By KNIGHT & COUCH, *Its Solicitors.*

July 19, 1889.

E. B. KNIGHT, *Counsel.*

156 And afterwards, to wit, on the 24th day of July, A. D. 1889, there was issued out of the clerk's office of said court the following subpœna directed to the marshal of the northern district of Ohio; said subpœna is clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon the Toledo & Ohio Central Railway Company, citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Columbus, on the first Monday in October next, to answer a certain bill in chancery filed and exhibited in said court against it by the Mercantile Trust Company, a corporation created and existing under the laws of the State of New York, citizen of and resident in the State of New York.

Hereof you are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

157 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of July, A. D. 1889, [SEAL.] and in the 114th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.*

MEMORANDUM.—The said defendant is required to enter its appearance in this suit in the clerk's office of said court on or before the first Monday of September, 1889; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

Endorsed: $50.00 deposited.

158 And afterwards, to wit, on the 24th day of July, A. D. 1889, there was issued out of the clerk's office of said court our certain subpœna directed to the marshal; said subpœna is clothed in the words and figures foolowing, to wit:

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon the Shawnee and Muskingum River Railway Co., citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Columbus, on the first Monday in October next, to answer a certain bill in chancery filed and exhibited in said court against it by the Mercantile Trust Company, a corporation created and existing under the laws of the State of New York, citizen of and resident in the State of New York.

Hereof you are not to fail, under the penalty of the law thence ensuing.

159 And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice [SEAL.] of the United States, this 24th day of July, A. D. 1889, and in the 114th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.*

MEMORANDUM.—The said defendant is required to enter its appearance in this suit in the clerk's office of said court on or before the first Monday of September, 1889; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

Endorsed: $50.00 deposited.

160 And afterwards, to wit, on the 3rd day of Aug., A. D. 1889, came the marshal to whom the above subpœna was in form directed and filed the same in the clerk's office of said court, with

his proceedings had endorsed thereon in the words and figures following, to wit:

Marshal's Return.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 1st day of August, 1889, at Cleveland, Ohio, I made due service of this writ by delivering a true and duly certified copy thereof to Stevenson Burke, president of the within-named The Toledo and Ohio Central Railway Company.

B. F. WADE,
U. S. Marshal.
By J. S. EBERMAN, *Deputy.*

Fees.

Service	$2 00
Copy	50
Travl. mile	06
	$2 56

161 And afterwards, to wit, on the 5th day of Aug., A. D. 1889, came the marshal to whom the above subpœna was in form directed and filed the same in the clerk's office of said court, with his proceedings had endorsed thereon in the words and figures following, to wit:

Marshal's Return.

Received this writ July 29, 1889, and on Saturday, August 3rd, 1889, I executed the same by delivering a true copy thereof, with endorsements thereon, to E. C. Winstanley, president of the within-named The Shawnee and Muskingum River Railway Company, at the office of said company, in Zanesville, in said district.

Fees.

Street-car fare	$ 25
R. R. fare	3 35
1 service	2 00
1 copy	50
Total	$6 10

JOHN O'NEILL,
Deputy U. S. Marshal.

162 And afterwards, to wit, on the 17th day of September, A. D. 1889, there was issued out of the clerk's office of said court our certain subpœna directed to the marshal of the district and against the defendant herein. Said subpœna is clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon the Toledo and Ohio Central Railway Co., impleaded with the Shawnee and Muskingum River Railway Co. *et al.*, citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Columbus, on the first Monday in October next, to answer a certain bill in chancery filed and exhibited in said court against it by the Mercantile Trust Company, a corporation created and existing under the laws of the State of New York, citizen of and resident in the State of New York. Hereof you are not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

163 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of Sept., A. D. 1889, and in the 114th year of the Independence of the United States of America.

Attest:

[SEAL.] B. R. COWEN, *Clerk.*

MEMORANDUM.—The said defendant is required to enter its appearance in this suit in the clerk's office of said court on or before the first Monday of October, 1889; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

164 And afterwards, to wit, on the 19th day of Sept., A. D. 1889, came the marshal to whom the above subpœna was in form directed and filed the same in the clerk's office of said court, with his proceedings had endorsed thereon, in the words and figures following, to wit:

Marshal's Return.

Received this writ September 18, 1889, and on Sept. 18, A. D. 1889, I served the same by handing a true copy thereof, with the endorsements thereon, to Charles S. Morgan, the regular ticket and freight agent of the Toledo & Ohio Central Railway Company.

Fees.

1 copy	50
1 mile	06
1 service	2 00
	$2 56

J. H. SIMMONS,
U. S. Marshal,
By WM. S. DRESBACK, *Deputy.*

And afterwards, to wit, on the 24th day of September, A. D. 1889, an order was made upon the order book of said court clothed in the words and figures followig, to wit:

Order Book A, p. 112.

Leave is granted to Edwin Thatcher and H. R. Mathias to file cross-bills in this action upon the said Edwin Thatcher and H. R. Mathias each filing a proper cost bond approved by the clerk; and it is further ordered that after the filing and approval of
165 said bonds that a rule issue against the said receiver of said Kanawha and Ohio Railway Company to show cause why the relief sought by said cross-bills should not be granted, and thereupon the said Edwin Thacher and H. R. Mathias severally gave a cost bond, with L. M. Jewett, of Athens, Ohio, as their security, to the approval of the clerk of this court.

And afterwards, to wit, on the 24th day of September, A. D. 1889, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

Circuit Court of the United States for the Southern District of Ohio, Eastern Division, *ss:*

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA & OHIO RAILWAY CO. } Cost Bond. # 479.

I hereby acknowledge myself security for costs in this case in matter of cross-bill of Edwin Thatcher.

L. M. JEWETT. [SEAL.]

Taken and acknowledged before me this 24th day of Sept., 1889.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, L. M. Jewett, a resident of said district, do solemnly
166 swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

L. M. JEWETT.

Sworn to and subscribed before me this 24th day of September, A. D. 1889.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

And afterwards, to wit, on the same day, there was issued out of the clerk's office of said court the following cross-bill, — was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cross-bill of Edwin Thatcher.

THE UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY. } No. 479.

Cross-bill.

Upon leave of the court being first obtained and had Edwin Thatcher, a resident of the State of Alabama, now comes and makes himself a party to this action, and for his cross-bill states that the said Kanawha and Ohio Railway Company is indebted to
167 him in the sum of $3,609.77, with interest from March 27, 1889, being a balance due him for building bridges Nos. 321, 324, and 327 on the line of said railway over Sunday creek, in section 2, Athens county and State of Ohio, reference being hereby made to the records, plats, surveys, and profiles of said railroad for a more particular description of the location of said work.

The following is a true statement of the account of said indebtedness between your orator and said Kanawha and Ohio Railroad Company:

1889.		
March 27th. For building, constructing, and erecting bridge No. 327, 1 span through continuation truss skew, erected and ready for the rails, and painted one coat after erection; timber for false work furnished by the railway company, 84 lineal feet, at $24.90 per foot....	$2,091	60
1889.		
March 27. For building, constructing, and erecting bridge No. 324, through combination truss screw, erected ready for the rails, and painted one coat after erection; bottom for false work and timber for top false work furnished by said railway company, 84 lineal feet, at $23.95 per foot.....	2,011	80
1889.		
March 27. For building, constructing, and erecting bridge No. 321, one span through combination truss skew, 17′ wide, C. to C., erected ready for the rails, and painted one coat after erecting; bottom false work and timber for top false work furnished by railway company, 84 lineal feet, at $23.95 per foot.....	2,011	80
168 Add for extra width $45.00, equals.....	2,056	80

That all of said labor was performed and material furnished by said Edwin Thatcher for said railway company between the 15*h*th day of October, 1888, and the 27th day of March, 1889, under and by virtue of a written contract by letter or correspondence between said railway company, acting by its duly authorized agents, and said Edwin Thatcher, said correspondence commencing on the 25th day of July, 1888, and terminating on the 19th day of September, 1888, whereby said railway Co. in writing promised and agreed to pay this cross-petitioner the prices above charged for the construction and erection of said three bridges whenever said work was completed and accepted by said railway, and *i*on the said 27th day of March, *189* 1889, said bridges were completed and inspected by the chief engineer of said railway company and found to be constructed, erected, furnished, and comp-eted in accordance with the terms of said written contract, and said railway company then accepted said bridges from the cross-petitioner.

The total price and value for the construction of said 3 bridges is $6,160.20; deduct freight paid by said railway company, $550.43, and cash paid by it Jan. 23, 1889, $2,000.00, equals $2,550.43, leaving a balance of $3,609.77 due this cross-petitioner, with interest from March 27, 1889, and which said sum of money then became due and payable.

Your cross-petitioner avers that in accordance with the laws of Ohio for the protection of persons furnishing material and performing labor in the construction of railroad bridges, he, on the 28th day of March, 1889, filed in the office of the recorder of
169 Athens county, Ohio, being the county where said 3 bridges were erected and constructed, a true statement, by affidavit duly verified, of the amount and value of said work, labor, and material, and the amount due and unpaid thereon, and at what place and between what dates said work was begun and ended, and the recorder of Athens county, Ohio, on the 28th day of March, 1889, duly notified the receiver of said railway of the filing of said lien and claim, and notice of the filing thereof was given to said railway company's agent at Athens, Ohio, on said last-named date, in accordance with the laws of Ohio, — then obtained a lien upon said bridges and said railway for the payment of his claim.

Your cross-petition- prays the court for a judgment against said railway Co. and said receiver for said sum and interest and for an order directing the receiver of said Kanawha and Ohio Railway Company to pay out of the funds now in his hands or out of the funds hereafter to *pay out of the funds now in his hands or out of the funds hereafter to* come into his hands to your cross-petitioner or to his solicitors, L. M. Jewett, Esq., for his use said sum of $3,609.77, with interest from March 27, 1889, and for such other and further relief as equity and the nature of the case may require.

L. M. JEWETT,
Solicitor for Edwin Thatcher.
L. M. J.

THE STATE OF OHIO, } ss:
Athens County, }

L. M. Jewett, being first duly sworn, deposes and says that the said Edwin Thatcher is a non-resident of the circuit in the
170 eastern division of the southern district of Ohio and is a resident of the State of Alabama, and that the facts stated in the foregoing cross-bill are true, and affiant is the solicitor of said Edwin Thatcher.

L. M. JEWETT.

Subscribed by the said L. M. Jewett in my presence and sworn *sworn* to by him before me this 23rd day of September, A. D. 1889.

W. S. WILSON,
Probate Judge, Athens Co., Ohio. [SEAL.]

And afterwards, to wit, on the 24th day of September, A. D. 1889, the following cost bond was filed in the clerk's office of said court, *f*lothed in the words and figures following, to wit:

Cost Bond of M. R. Mathias.

171 Circuit Court of the United States for the Southern District of Ohio, Eastern Division, *ss:*

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA & OHIO RAILWAY CO. } Cost Bond. #479.

I hereby acknowledge myself security for costs in this case in matter of cross-bill of M. R. Matthias.

L. M. JEWETT. [SEAL.]

Taken and acknowledged before me this 24th day of Sept., 1889.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, L. M. Jewett, a resident of said district, do solemnly
172 swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

L. M. JEWETT.

Sworn to and subscribed before me this 24th day of September, A. D. 1889.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

And afterwards, to wit, on the same day, there was filed in the clerk's office of said court the following cross-bill, clothed in the words and figures following, to wit:

Cross-bill of M. R. Matthias.

In the Circuit Court of the United States in and for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY. } No. 479. Cross-bill.

Now comes H. R. Matthias, a resident of Ohio, and, upon leave of the court being first had and obtained for his cross-bill, herein states that the Athens Water Wheel and Machine Company is a corporation duly created and organized under and by virtue of the laws of the State of Ohio, and that said Kanawha and Ohio Railway Company on the 28th day of February, 1889, was in debt
173 to the said Athens Water Wheel and Machine Company in the sum of $1,062 58 on account of divers machinery, castings, and supplies by said Athens Water Wheel and Machine Company before that time sold and delivered to said Kanawha and Ohio Railway Company at its special instance and request and for its use and benefit, and which said sum of money was then due and payable and remains unpaid, and there has been an accounting between said Athens Water Wheel and Machine Company and said railway company, and the amount of said indebtedness agreed upon and said sum of $1,062.58 was allowed by said railway company, by vouchers duly approved at the times and in the amounts following, to wit:

Dec. 1, 1888, voucher 136	$256 90
January 1, 1889, voucher 75	223 34
Feb. 1, 1889, voucher 94	424 52
Feb. —, 1889, voucher sundry odd bills	157 82
Making said sum of	$1,062 58

And said indebtedness remains unpaid, and said Mathias cannot obtain payment of the same without the order of this court, and he avers that prior to the filing of this cross-bill and since the allowance of said vouchers said Athens Water Wheel and Machine Company sold and assigned their said claim of $1,062.58 and the interest thereon to the said H. R. Mathias, who is now legal owner and holder of said claim, and there is now due him thereon from the Kanawha and Ohio Railway Company the said sum of $1,062.58, with interest thereon from Feb. 28, 1889.

Said H. R. Mathias prays that he may have judgment against said railway company and its receiver for said sum of $1,062.58, with interest from Feb. 28, 1889; that the receiver of said
174 Kanawha and Ohio *and Ohio* Railway Company out of the funds now in his hands or out of funds hereafter to come into his hands be ordered to pay to this cross-petitioner the amount

of his said claim and interest, and for such other and further relief as equity and the nature of his case may require.

H. R. MATHIAS,
By L. M. JEWETT,
The *Solicitor.*

THE STATE OF OHIO, *Athens County,* } *ss:*

Said H. R. Mathias, being first duly sworn, deposes and says that he is a resident of the eastern division of the southern district of Ohio, of this judicial circuit, and that the facts stated in the foregoing cross-bill are true, as affiant believes.

H. R. MATHIAS.

Subscribed in my presence by said H. R. Mathias and by him sworn to before me this 23rd day of September, 1889.

WM. S. WILSON,
Probate Judge, Athens County, Ohio. [SEAL.]

175 And afterwards, to wit, on the 24th day of September, A. D. 1889, there was issued out of the clerk's office of said court the following rule to show cause. Said rule is clothed in the words and figures following, to wit:

Rule to Show Cause.

In the Circuit Court of the United States, Eastern Division, Southern District of Ohio.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY. } # 479.

Rule to show cause.

The President of the United States of America to Robert W. Kelley, receiver:

You are hereby cited and admonished to be and appear before our circuit court of the United States within and for the southern district of Ohio on Tuesday, the 22nd day of October, 1889, to show cause, if any you know or have, why the relief sought by the cross-bill of Edwin Thatcher should not be granted.

And it is ordered that the marshal of this district make legal service and due return of this rule on or before the appearance day above noted.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of Sept., A. D. 1889.

Attest: B. R. COWEN, *Clerk.* [SEAL.]

176 And afterwards, to wit, on the 24th day of September, A. D. 1889, there was issued out of the clerk's office of said court the following rule to show cause. Said rule is clothed in the words and figures following, to wit:

Rule to Show Cause.

In the Circuit Court of the United States, Eastern Division, Southern District of Ohio.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY. } # 479.

Rule to show cause.

The President of the United States of America to Robert W. Kelley, receiver:

You are hereby cited and admonished to be and appear before our circuit court of the United States within and for the southern district of Ohio, on Tuesday, the 22nd day of October, 1889, to show cause, if any you know or have, why the relief sought by the cross-bill of H. R. Matthias should not be granted,

And it is ordered that the marshal of this district make legal service and due return of this rule on or before the appearance day above noted.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of Sept., A. D. 1889.

Attest: B. R. COWEN, *Clerk.* [SEAL.]

177 And afterwards, to wit, on the 25th day of September, A. D. 1889, came the marshal to whom the foregoing rule to show cause was in form directed and returned the same in the clerk's office of said court, with his proceedings had endorsed thereon in the words and figures following, to wit:

Marshal's Return.

Received this writ at Cincinnati, Ohio, September 24th, A. D. 1889, and, pursuant to its commands, I did on the 25th day of September, A. D. 1889, at Cincinnati, Ohio, serve the said Robert W. Kelley, receiver, by delivering to him personally a true copy hereof, having all the endorsements thereon.

J. H. SIMMONS,
U. S. Marshal,
By JOHN W. HOOK,
Depaty U. S. Marshal.

One copy	50
One service	2 00
125 miles	7 50
	$10 00

178 And afterwards, to wit, on the 25th day of September, A. D. 1889, came the marshal to whom the foregoing rule to show

cause was in form directed and returned the same in the clerk's office of said court, with his proceedings had endorsed thereon in the words and figures following, to wit:

Marshal's Return.

Received this writ at Cincinnati, Ohio, September 24th, A. D. 1889, and, pursuant to its commands, I did on the 25th day of September, A. D. 1889, at Cincinnati, Ohio, serve the said Robert W. Kelley, receiver, by delivering to him personally a true copy hereof, having all the endorsements thereon.

J. H. SIMMONS,
U. S. Marshal,
By JOHN W. HOOK,
Deputy U. S. Marshal.

One copy	50
One service	2 00
125 miles	7 50
	$10 00

179 And afterwards, to wit, on the 1st day of October, A. D. 1889, the following appearance of T. & O. C. R'y Co. was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appearance of T. & O. C. R'y Co.

THE MERCANTILE TRUST CO., Trustee,
vs.
THE KANAWHA AND OHIO RAILWAY CO. *et al.* } In Equity. No. 479.

The Toledo and Ohio Central Railway Company, one of the defendants herein, waiving the issuing and service of subpœna, hereby enters its appearance herein for the purposes of this suit.

THE TOLEDO AND OHIO CENTRAL R'Y CO.,
By A. W. SCOTT, *Its Att'y.*

180 And afterwards, to wit, on the 7th day of October, A. D. 1889, the following petition of receiver was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee, Plaintiff,
against
THE KANAWHA AND OHIO RAILWAY COMPANY, Defendant.

Petition of Receiver.

Robert W. Kelley, receiver, respectfully shows to this honorable court as follows:

1. He refers to his petition herein filed March 13, 1889, and to order of this court thereon filed on the same day.

2. He is not able to obtain the assent of the holders of all the bonds secured by the mortgage sought to be foreclosed herein, which assent was made a condition of the operation of said order, except with respect to taxes, until the further order of this court. Of the 1,160 bonds outstanding under said mortgage, the holders of seven hundred and fifty-three thereof assent to the payment by the receiver of all sums needed to comply with the rolling-stock contracts set forth in said petition out of money in or to come
181 into his hands as receiver or out of money to be borrowed by him as receiver in any manner approved by the court, and the holders of fifty more of said bonds assent to the payment of such sums out of the "receipts of the road in hand or to come in hand," as is more fully shown by the consents hereto attached.

In addition to the bondholders who have assented as aforesaid, your petitioner has caused a circular, dated September 30, 1889, a copy of which is hereto attached, to be sent to the following persons, who, he is informed and believes, hold said bonds to the number set opposite their names, respectively, on the following list, to wit:

Erwin Davis	175
Weeks & Co	16
Francis A. Fogg	5
Thomas Branch & Co	26
Lummis & Day	8
J. H. Small	2
David Stewart	3
L. Levy & Co	5
E. St. H. Hayes & Co	9
Caldwell & Bunker	10
Geo. J. McGourkey	3
Lehman Bros	2
Charles Duggin	2
James G. King Sons	5
S. B. Mills	5
Kountze Brothers	8
Jamison, Smith & Cothiy	72
J. E. Fischer	6
W. S. Lawson & Co	2

182 In the case of Erwin Davis and several others the notice was delivered at the office of the holder on Monday, September 30th, or Tuesday, October 1st, and in all other cases it was mailed, duly addressed, in the city of New York, on one or the other of said dates. All of the persons and firms so addressed, except Thos. Branch & Co., of Richmond, Va., have post-office addresses within the city of New York.

Your petitioner does not know the names or addresses of any other of the holders of said bonds and has not received any answers to the notices so sent except those hereto attached, nor is he informed

that any of the holde-s of the said bonds object to his making the payments referred to in said notice.

Thirty-two of the said bonds are held by the Central Trust Company and against them have been issued scrip certificates for fractional amounts of bonds. Your petitioner has caused to be delivered to the said Central Trust Company a copy of the said notice. He has not been able otherwise to reach any of the holders of said scrip certificates, nor has he been able in any way to reach the holders of the remainder of said 1,160 bonds.

3. Messrs. Burnham, Parry, Williams & Co., the Pullman's Palace Car Company, and the Atlantic Trust Company, under the rolling-stock contracts referred to in said petition filed March 13, 1889, have, in one way and another, been urging their rights—demanding either payment of the sums due to them under their contract or the surrender of the rolling stock—and this petitioner, in this connection, refers to the petition in this cause heretofore filed by the Atlantic Trust Company, upon which petition no hearing has yet been had.

183 4. All the rolling stock mentioned in said petition filed March 13, 1889, has been constantly used by the petitioner, as receiver, from the time of his appointment up to the present time. All of it has been needed for the operation of the road and is still needed, and if the same or any part thereof should be surrendered to the owners or lessors thereof it would be necessary, in order to properly operate the road, to procure the same or other rolling stock by lease, and, from estimates which the receiver has made, based upon sufficient information, he believes that such rolling stock could not be leased for a less rental than five thousand dollars per month in the aggregate. Indeed, the present demand for rolling stock is such that it is doubtful whether proper rolling stock for the operation of the road could be procured by him upon lease upon any reasonable terms.

5. While said rolling stock has been in the possession of the receiver and up to October 1st, 1889, he has received for the use of part thereof, beyond the line of railroad in his possession—that is, for mileage upon connecting and foreign roads—not less than $10,500. This cash receipt is a benefit received from such rolling stock in addition to the benefit of the use thereof upon the line of railroad in the possession of the receiver.

6. That the a-ounts which have become due and are unpaid under the several contracts before mentioned are as follows:

Under Burnham, Parry, Williams & Co., contract for 6 locomotives, $4,766.88, being the amount of three notes, due, respectively, March 9, April 9, and May 9, 1889.

Under Burnham, Parry, Williams & Co.'s contract for 4 locomotives, $5,786.58, being the amount of six notes, due March 7, April 7, May 7, June 7, July 7, and August 7, 1889.

184 On Pullman's Palace Car Company's contract for one hundred 25-ton box cars, 150 25-ton gondola cars, and 64 15-ton gondola cars, $23,843.28, being the amount of eight notes which

became due March 1st, April 1st, May 1st, June 1st, July 1st, August 1st, September 1st, and October 1st, 1889.

On the contract with Robert Seney, assigned to the Atlantic Trust Company, for 200 25-ton box cars, $1.960, interest on 56 bonds, which fell due May 1, 1889. The payment of said interest will put an end to the default under said Atlantic Trust Company agreement.

Your petitioner has reliable assurances from the Pullman's Palace Car Company that it will not press its claim under its said contract for the present, provided that the three notes first becoming due as aforesaid are presently paid. For use of the rolling stock covered by the Pullman's Palace Car Company contract upon connecting and foreign roads during the receivership the receiver has received about $6,000, and the reasonable rental for that rolling stock is, as the receiver believes, not less than $1,800 a month, or for the 7½ months already expired of said receivership will be the sum of $13,500.

The petitioner therefore prays for leave to make payments in accordance with said contracts.

NORTHERN DISTRICT OF OHIO, *ss:*

Robert W. Kelley, being duly sworn, says that the statements in the foregoing petition are true, as he believes.

ROBERT W. KELLEY.

Sworn to and subscribed before me this 7th day of October, A. D. 1889.

MARTIN W. SANDERS,
U. S. Court, N. D. O.

185 (*Circular Referred to in the Foregoing Petition.*)

NEW YORK, *Sept.* 30, 1889.

To the holders of first-mortgage bonds of the Kanawha and Ohio Railway Company:

The undersigned, upon his appointment as receiver of the property of the Kanawha and Ohio Railway Company, took possession, among other things, of certain rolling stock held under leases and contracts, as follows:

(*a.*) Six locomotives, under contract with Messrs. Burnham, Parry, Williams & Co., on account of which the railway company had paid $47,099.62, and there remained unpaid, to complete the purchase, $4,766.88, the amount unpaid being represented by the railway company's three notes for $1,588.96 each, payable in March, April, and May, 1889.

(*b.*) Four locomotives, under contract with Messrs. Burnham, Parry, Williams & Co., on which the railway company had paid $25,694.17, and there remained unpaid, to complete the purchase, $5,786.58, the amount remaining unpaid being represented by the railway company's six promissory notes, each for the principal sum

of $964.43, due in March, April, May, June, July, August, and September, 1889.

(*c.*) One hundred 25-ton box cars, 150 25-ton gondola cars, and 64 15-ton gondola cars, under contract with Pullman's Palace Car Company, on which the said railway company had paid $100,724.43, and there remained unpaid, to complete the purchase, $38,745.33, said amount remaining unpaid being represented by the railway company's 13 promissory notes, for $2,980.41 each, due on the first day of each month from March, 1889, to March, 1890, incl.

186 (*d.*) Two hundred 25-ton box cars, built by the Pullman's Palace Car Company, held under agreement with Robert Seney, trustee, trustee's interest having since been transferred to the Atlantic Trust Company as trustee, on account of which rolling stock the railway company had paid $67,650, and there remained unpaid $56,000, represented by 56 bonds of the said company, upon which an instalment of interest fell due on the first day of May, 1889, amounting to $1,960, and a further instalment of interest of the same amount and also $8,000 of principal will become due Nov. 1st, 1889.

The receiver has since his appointment made no payments on account of this rolling stock.

The Atlantic Trust Company has already filed its petition in the suit in which the receiver of the rolling stock covered by the agreement under which it is trustee. It is anticipated that similar action may be taken by Messrs. Burnham, Parry, Williams & Co. and by Pullman's Palace Car Company.

This rolling stock being necessary to the operation of the road, the undersigned will apply to the Hon. Howell E. Jackson, circuit judge, at the United States court-rooms, in Cleveland, Ohio, on Monday, the 7th day of October, 1889, for leave to make payments in accordance with said contracts. He asks the bondholders to advise him at once, through Messrs. Simpson, Thacher & Barnum, No. 10 Wall street, New York city, whether they assent to such payments being made by him out of money in or to come into his hands as receiver or out of money to be borrowed by him as receiver in any manner approved by the court.

Respectfully, ROBERT W. KELLEY, *Receiver.*

187 NEW YORK, *October 1st*, 1889.

To Robert W. Kelley, receiver of the property of the Kanawha & Ohio R'y Co.

DEAR SIR: The undersigned holders or duly authorized to represent holders of first-mortgage bonds of the above-named railway company to the number or amount set opposite our names respectively hereby assent to your making payments in accordance with the several contracts for rolling stock or equipment mentioned in the circular hereto attached out of money in or to come into your hands as such receiver or out of the money to be borrowed by you as receiver in any manner approved by the court appointing you as such receiver.

This assent is intended to cover the payment of not only such sums as are now due and payable under the said contracts or any of them, but also such sums as may hereafter become due and payable under any of said contracts.

Respectfully,

JOHN W. SIMPSON,	$30,000.
NELSON ROBINSON,	129,000.
HOMANS & CO.,	250,000.
SAM'L L. POST, JR.,	90,000.
L. W. BOOCOCK,	50,000.
E. C. HOMANS,	85,000.
MATURIN BALLOU,	100,000.

188 NEW YORK, *Sept.* 30, 1889.

To the holders of first-mortgage bonds of the Kanawha and Ohio Railway Company:

The undersigned, upon his appointment as receiver of the property of the Kanawha and Ohio Railway Company, took possession, among other things, of certain rolling stock held under leases and contracts, as follows:

(*a.*) Six locomotives, under contract with Messrs. Burnham, Parry, Williams & Co., on account of which the railway company had paid $47,099.62, and there remained unpaid to complete the purchase $4,766.88, the amount unpaid being represented by the railway company's three notes for $1,588.96 each, payable in March, April, and May, 1889.

(*b.*) Four locomotives, under contract with Messrs. Burnham, Parry, Williams & Co., on which the railway company had paid $25,694.17, and there remained unpaid to complete the purchase $5,786.58, the amount remaining unpaid being represented by the railway company's six promissory notes, each for the principal sum of $964.43, due in March, April, May, June, July, August, and September, 1889.

(*c.*) One hundred 25-ton box cars, 150 25-ton gondola cars, and 64 15-ton gondola cars, under contract with Pullman's Palace Car Company, on which the said railway company had paid $100,724.43, and there remained unpaid to complete the purchase $38,745.33, said amount remaining unpaid being represented by the railway company's 13 promissory notes for $2,980.41 each, due on the first day of each month from March, 1889, to March, 1890, incl.

189 (*d.*) Two hundred 25-ton box cars, built by the Pullman's Palace Car Company, held under agreement with Robert Seney, trustee, trustee's interest having since been transferred to the Atlantic Trust Company, as trustee, on account of which rolling stock the railway company had paid $67,650, and there remained unpaid $56,000, represented by 56 bonds of the said company, upon which an instalment of interest fell due on the first day of May, 1889, amounting to $1,960, and a further instalment of interest of the same amount and also $8,000 of principal will become due Nov. 1st, 1889.

The receiver has since his appointment made no payments on account of this rolling stock.

The Atlantic Trust Company has already filed its petition in the suit in which the receiver of the rolling stock covered by the agreement under which it is trustee. It is anticipated that similar action may be taken by Messrs. Burnham, Parry, Williams & Co. and by Pullman's Palace Car Company.

This rolling stock being necessary to the operation of the road, the undersigned will apply to the Hon. Howell E. Jackson, circuit judge, at the United States court-rooms, in Cleveland, Ohio, on Monday, the 7th day of October, 1889, for leave to make payments in accordance with said contracts. He asks the bondholders to advise him at once, through Messrs. Simpson, Thacher & Barnum, No. 10 Wall street, New York city, whether they assent to such payments being made by him out of money in or to come into his hands as receiver, or out of money to be borrowed by him as receiver in any manner approved by the court.

Respectfully, ROBERT W. KELLEY, *Receiver.*

I hereby signify my consent.

JAMES B. METCALF. 10 bonds.

Oct. 3, 1889.

190 POUGHKEEPSIE, *Oct.* 2, 1889.

Mr. Rob't W. Kelley, receiver K. & O. R'y Co.

DEAR SIR: Referring to your circular of Oct. 1st inst., I would say, as owner of $35,000 and representing owners in this vicinity of about $15,000 more 1st-mortgage bonds of the Kanawha and Ohio R'y Co., I consider it very important to the owner- of the property that the court grant an order allowing you to use the receipts of the road in hand and to come in hand to paying the contracts for rolling stock scheduled in your circular- *a*, *b*, *c*, & *d*, and I hereby not only consent, but hope such an order will be granted as soon as possible.

Yours very truly, C. H. ROBERTS.

191 W. A. & A. M. White. P. O. address, box 619.

No. 130 WATER STREET, NEW YORK, *Oct.* 2, 1889.

Messrs. Simpson, Thatcher & Barnum, 10 Wall street.

GENTS: As 1st-mortgage bondholder of Kanawha & Ohio R'y Co., I assent to payments being made by the *the* receiver of amounts due for equ'p't — interest thereon, as *for* his circular, to bondholders dated Sept. 30, '89, & specified as *a*, *b*, *c*, & *d*.

Respt, ALEX M. WHITE.

4 bonds.

192 Dick Brothers & Lawrence, 41 Wall street, New York.

R. W. Kelley, Esq., receiver Kanawha & Ohio R. Co.

SIR: I hereby authorize the payment of necessary amounts for rolling stock, as per schedule submitted by the receiver.

Y'rs, W. B. LAWRENCE,

For —— ——.

$5,000 1st mort.

193 And afterwards, to wit, on the 7th day of October, A. D. 1889, the following order was entered upon the order book of said court, clothed in the words and figures following, to wit:

Order Book A, p. 112.

Upon the petition of Robert W. Kelley, receiver, verified this day and to be filed herewith, it is ordered that said receiver be, and hereby is, authorized to apply any surplus earnings of the railroad and property in his possession to the payment of the sums required to be paid under the rolling-stock contracts mentioned in his said petition, first paying interest due and thereafter paying *pro rata* on the principal payments on all said contracts.

Approved Oct. 7, 1889.

HOWELL E. JACKSON,
Circuit Judge.

194 And afterwards, to wit, on the 21st day of October, A. D. 1889, the following answer of R. W. Kelley was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of Robert W. Kelley, Receiver.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA & OHIO RAILWAY CO. } # 479.

Answer to cross-bill of R. H. Mathais.

The defendant Robert W. Kelley, receiver of the Kanawha and Ohio Railway Co., saving, &c., for answer to so much of the cross-bill of R. H. Mathias as he is advised it is material for him to answer, says that he is informed and believes that the said The Kanawha & Ohio Railway Co. was justly indebted to the said Mathias on the 28th day of Feb., 1889, in the sum of $1,062.58 as and for the purposes stated in said cross-bill, no part of which indebtedness has been paid to the knowledge of this defendant; and, having fully answered, this defendant prays, &c.

ROBERT W. KELLEY,
Receiver of the Kanawha & Ohio Railway Company,
By KNIGHT & COUCH, *Sol's.*

UNITED STATES OF AMERICA, }
District of West Virginia, } *To wit:*

195 Robert W. Kelley, receiver of the Kanawha and Ohio Railway Company, whose name is signed to the foregoing answer, being by me first duly sworn, says that the allegations in said answer contained are true, as affiant verily believes.

ROBERT W. KELLEY,
Receiver Kanawha & Ohio R'y Co.

Subscribed in my presence and sworn to before me this 19th day of October, 1889, in my said district.

D. A. GALLAHER,
Com. U. S. Dist. Court for District of West Virginia.

And afterwards, to wit, on the 21st day of October, A. D. 1889, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of Robert W. Kelley, Receiver, to X Bill of Edwin Thatcher.

Circuit Court of the U. S. for the Southern Distr. of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA & OHIO RAILWAY COMPANY. } No. 479.

Answer to X bill of Edwin Thacher.

The defendant Robert W. Kelley, receiver of the defendant The Kanawha and Ohio Railway Company, saving, &c., for answer to the cross-bill exhibited against him by Edwin Thacher in the above-entitled cause, says that it is true, as alleged by said
196 Thatcher in his said cross-bill, that the said The Kanawha and Ohio Railway Co. was indebted to said Thatcher on the 27th day of March, 1889, but the amount of such indebtedness is not accurately stated in said cross-bill.

That it is true, as alleged in said cross-bill, that the said Thacher furnished the material and constructed for the said The Kanawha and Ohio R'y Co. bridges # 321, 324, and 327, and also this defendant avers for the material furnished said railway company for that certain other bridge # 326, all of which work was done and material furnished by the said Thacher in pursuance of a contract with the said railway company.

This defendant avers that the true amount due the said Thacher from said company on said March 27, 1889, on said four bridges was the sum of $5,102.09 after deducting cash and freight paid by the said railway company in said contract; that a true and correct statement of said account, showing the balance aforesaid due the said Thacher, is herewith filed and prayed to be read as part of this answer, marked "Exhibit Thacher."

That said balance of $5,102.09, with interest from said March 27, 1889, is still due and wholly unpaid, as this defendant is informed and believes.

That all of said bridges are absolutely necessary for the safe and prudent management and operation of the said railway by this defendant as its receiver.

And, having fully answered, this defendant prays, &c.

ROBERT W. KELLEY,
Receiver of the Kanawha & Ohio R'y Co.
By KNIGHT & COUCH, *Solicitors.*

197 UNITED STATES OF AMERICA, *District of West Virginia,* } *To wit:*

Robert W. Kelley, receiver of the Kanawha and Ohio Railway Company, whose name is signed to the foregoing answer, being by me first duly sworn, says that the allegations in said answer contained are true, as he verily believes.

ROBERT W. KELLEY,
Receiver of Kanawha & Ohio Railway Company.

Subscribed in my presence and sworn to before me this 19th day of October, 1889, in my said district.

D. C. GALLAHER,
Commissioner U. S. Dist. Court for District of West Virginia.

And afterwards, to wit, on the same day, to wit, the 21st day of October, A. D. 1889, the following exhibit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

EXHIBIT.

Edwin Thacher, Esq., in ac. with Kanawha & Ohio railway.

DR.

1888.				
Nov. —.	To bill #18, freight crarges		162 96	
Dec. —.	" " #13, " "		395 67	
1889.				
Jan. —.	" " #23, " "		98 40	
M'ch —.	" " #1. " "		76 88	
				733 91
	Balance			5,102 09
				5,836 00

198 CR.

1889.				
Feb. —.	By vou. #29, bridge #327		2,091 60	
				2,091 60
	By vou. #30, bridge #321		2,056 80	
	" #324		2,011 80	
	" #326		1,675 80	
			5,744 40	
	Less cash payment		2,000 00	
				3,744 40
				5,836 00
	By balance			5,102 09

{ Kanawha & Ohio R'y, Auditor's Office, Oct. 18, 1889, Charleston, W. Va. }

199 And afterwards, to wit, on the 26th day of October, A. D. 1889, an order was made upon the order book of said court clothed in the words and figures following, to wit:

Order Book A, p. 113.

The subpœna issued in the above-entitled cause for the defendant The Shawnee and Muskingum River Railway Company having been returned and said return having been filed, and it appearing therefrom that the said subpœna was duly served on said defendant, The Shawnee and Muskingum River Railway Company, and no appearance having been entered on the part of said defendant or plea, answer, or demurrer filed on its behalf, now, therefore, on motion of the complainant, by its counsel, it is ordered and decreed that the bill herein be taken *pro confesso* as to said defendant, The Shawnee and Muskingum River Railway Company.

And afterwards, to wit, on the 30th day of October, A. D. 1889, the following petition of Erwin Davis was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition of Erwin Davis.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA & OHIO R'Y CO. } In Equity.

To the honorable the judges of the circuit court of the United
200 States for the southern district of Ohio, sitting in equity:

Your petitioner, Erwin Davis, a citizen and resident of the State of New York, respectfully represents unto your honors that the plaintiff in the above-entitled cause, The Mercantile Trust Company, heretofore and on or about the 18th day of February, A. D. 1889, filed in the circuit court of the United States for the southern district of Ohio, eastern division, its bill of complaint against the defendant The Kanawha and Ohio Railway Company, seeking the foreclosure of the mortgage or deed of trust in the bill mentioned.

Your petitioner further represents that after the filing of said bill, to wit, on or about the 19th day of Feb., A. D. 1889, in the said circuit court of the United States for the southern district of Ohio, eastern division, on the application of the complainant, the defendant appearing and not opposing, an order or decree was made in said cause so pending as aforesaid ordering, adjudging, and decreeing that Robert W. Kelley be appointed receiver of all the property of the defendant The Kanawha and Ohio Railway Company covered by the said mortgage or deed of trust wheresoever situated, with the owners' rights and duties conferred in and granted by the said order or decree, and that in pursuance of said order or decree said Robert W. Kelley, so appointed receiver as aforesaid, qualified as such in the manner required by said order or decree in said month of February, A. D. 1889, took possession of all the property cov-

ered by said mortgage in the States of Ohio and West Vir-
201 ginia except the bonds and stock of the Point Pleasant Bridge Co. in said mortgage mentioned, the said defendant railway Co., by the said Robert W. Kelley, who was at the time the president of said corporation, delivering such possession to himself as receiver in compliance of said order, and the said Robert W. Kelley as such receiver is not operating *a*or causing to be operated the railroad of the defendant railway Co.

Your petitioner further represents that the said plaintiff, the said The Mercantile Trust Company, on the 4th day of March, 1889, filed its ancillery bill in the district court of the United States for the district of West Virginia against the said The Kanawha and Ohio R'y Co., which bill was filed — a copy of complainant's said bill filed in this honorable court, to which complainant referred for more particular statement of the contents thereof and for the terms and conditions of said mortgage, and complainant prayed that said original bill be taken as part of its ancillary bill, complainant making all the averments and showing the same facts which are set out in said original bill as aforesaid.

In which ancillary bill it was prayed that the judges of the district court of the U. S. for the dist. of West Virginia would make such orders and decrees preliminary and final as were prayed for in said bill by complainant in the circuit court of the United States for the southern district of Ohio, eastern division, and *as* such other and necessary orders, judgments, and decrees as may be required in aid of said bill, and that said court will take ancillary jurisdiction with the said circuit court of the United States for the southern dist. of Ohio, eastern division, and give complainant all the relief which may be necessary to accomplish the purposes of filing said bill.

202 Petitioner further represents that the plaintiff, by its said attorneys, on the 25th day of May, 1889, moved the said court, then in session at Charleston, in said State, to confirm the appointment of the said Robert W. Kelley, receiver appointed by the decree of the 19th day of Feb., 1889, so entered by the circuit court of the U. S. for the southern dist. of Ohio, eastern division, so that the said Robert W. Kelley, as such receiver, be vested by said court with full power over that portion of said railroad as lies within the State of West Virginia; which said motion, after argument by counsel, was considered by the court and was denied, but without prejudice to any right it may have to institute a separate suit in said court for foreclosure or to amend its present bill so as to make said suit one of that character, all of which fully appears by the order entered in the proceedings of said ancillary bill and the opinion of Mr. Justice Harlan, filed therewith and made part of this petition.

Petitioner further represents that the plaintiff, The Mercantile Trust Co., afterwards, to wit, on the — day of ——, 1889, filed its bill in the circuit court of the United States for the district of West Virginia against the said The Kanawha & Ohio R'y Co., a copy of

which said last-mentioned bill is herewith exhibited with this petition and prayed to be read as part thereof.

Petitioner represents that the bill filed by complainant in the circuit court of the United States for the district of West Virginia *be* substantially the same as filed by it in the circuit court of the U. S. for the southern dist. of Ohio, eastern division, making
203 the same averments and praying for the same relief.

Petitioner further represents that plaintiff, as part of the relief asked for by it in its said bill filed in the circuit court of the United States for the district of West Virginia, prayed "that if and so far as it may be proper and necessary in view of said order or decree of said circuit court of the United States for the southern district of Ohio, eastern division, according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, money receipts, and earnings, rights, privileges, franchises, and immunities of the said railway company, and all other property included in and covered by the said mortgage, and that said Robert W. Kelley, heretofore as aforesaid appointed receiver of the said mortgage-railway and other property by the United States circuit court for the southern district of Ohio, eastern division, be by the order of this court in this cause appointed such receiver and entrusted with the control, operation, and management of the said mortgaged railway and other property, or that this court take such other action and make such other order or decree with reference to a receivership of the said mortgaged railway and other property as to your honors may seem proper and meet in view of the said appointment by the said circuit court of the United States for the southern district of Ohio, eastern division, and that pending such appointment or such action by this court the said Kelley, receiver, be protected in his possession of so much of said mortgaged railway and other property as is situate in the State of West Virginia."

204 Petitioner further represents that plaintiff, on the 21st day of August, 1889, before Mr. Justice Harlan and Jackson, district judge, sitting in chambers in the district of West Virginia, prayed for the appointment of the said Robert W. Kelley as such receiver as set out in the prayer of said bill above copied, which said motion having been argued by counsel (your petitioner appearing by counsel and opposing said motion) and considered by the court, the prayer of plaintiff was denied, the said judges refusing to appoint the said Robert W. Kelley as such receiver; a copy of the order denying such prayer is herewith filed and prayed to be read as part of this petition.

Petitioner therefore represents that there is no receiver for so much of said railroad as lies within the State of West Virginia, except so far as the said Kelley is invested with such power under the decree of this honorable court made and entered on the 19th day of February, 1889, as hereinbefore mentioned.

Petitioner avers and charges that he is directly interested in the management of said railroad; that he is the absolute owner of more than one hundred thousand dollars of the bonds secured by the

mortgage or deed of trust in the bill and -roceedings in said cause mentioned.

Petitioner further avers that he is the owner of more than five hundred thousand doolars par value of each class of stock of the defendant company, to wit, 1st, 2nd, preferred, and common, so that petitioner avers and charges that he is directly and largely interested in the financial condition and welfare of said railway company.

205 Petitioner being advised that the suit of plaintiff in the original bill filed in this honorable court, being a suit for foreclosure of the said mortgage or deed of trust by said plaintiff as trustee, and suit being really for the benefit of the bondholders under said mortgage or trust deed, petitioner as a bondholder is a *quasi* party to said suit and is entitled to be heard to protect his interests therein.

Petitioner avers and charges that for some time prior to the appointment of the said Robert W. Kelley receiver of the defendants railroad and other property by this honorable court he, the said Robert W. Kelley, was the president of the defendant company and to a large extend had the management and control of the said company and specially of its financial affairs.

Petitioner further represents that plaintiff in its bill filed in this hon. court charges that "the said defendant railway company has a large floating debt amounting to about $350,000, and that the said railway company is insolvent and unable to pay its floating debt and current and presently accruing indebtedne*dd*."

"That there are now due and unpaid considerable sums of money for taxes which have been levied and assessed upon the property of said defendant by municipal and State authorities having authority to levy and assess such taxes, which amounts the said defendant is unable to pay;" "that there is now due and will presently become due large amounts on account of labor, wages, and current expenses of said defendant which said defendant is wholly unable to pay."

206 Petitioner avers and charges that this condition of affairs was in part brought about by the said Kelley during -is management as president of the defendant company. Petitioner, therefore, cannot well see how the affairs of the defendant company can be placed upon a better financial basis under the said Kelley as receiver than under said Kelley as president.

Petitioner is informed and believes that the said Kelley is incompetent to manage the said company, and this his belief is sustained by the financial condition of said company as set out in said bill.

Petitioner is advised that at the time of his appointment the said Robert W. Kelley being the president of said corporation and as such an officer that he was ineligible to appointment as receiver.

Petitioner is further advised that the reason assigned for their exclusion is that, having shown themselves by their want of success unfit to manage the affairs of a corporation while solvent, they

should not be trusted to manage them as receivers, even though they be officers of the court and acting under its orders.

Petitioner charges and from information and belief says that the defendant, The Kanawha and Ohio Railway Company, is not insolvent as charged in said original bill; that at the present embarrassment of said company is occasioned by the missmanagement of the officers lately in control thereof; that the said railway company could pay the interest so secured by the mortgage or deed of trust, together with the necessary running expenses thereof, if properly managed, and petitioner, to show his *bona fides* as to this averment,

207 says that if the management of said defendant railway company be placed under his control by a proper order of this honorable court, to be made herein, petitioner will take a lease of said road for the term of twenty years and offer to pay the interest on the bonds secured by said mortgage or deed of trust and divide the net proceeds beyond this (after paying the necessary expenses for running and keeping the said road in proper repair) among the stockholders of said corporation.

Your petitioner therefore prays that inasmuch as the circuit court of the United States for the district of West Virginia has refused, upon the petition of the plaintiff, to appoint the said Robert W. Kelley receiver of that part of the defendant road as lies in the State of West Virginia, and further for the reason that the said Kelley, being an officer of the said road, was ineligible to said appointment, and also because of the incompetency of the said Kelley to manage the said property as shown by his mismanagement while president, that this honorable court will remove the said Robert W. Kelley from his position as receiver, so conferred upon him by the said decree of February 19, 1889, and will appoint some capable disinterested person who will take charge of and manage said property under the orders of this honorable court to the best interests of all parties concerned; and, as in duty bound, he will ever pray, &c.

ERWIN DAVIS.

J. B. JACKSON, *Solicitor.*

208 UNITED STATES OF AMERICA, }
Southern District of New. York. }

Erwin Davis, the petitioner in the foregoing petition named, being duly sworn, says that he has read the foregoing petition and knows the contents thereof; that the allegations therein contained, so far as the same are stated to be on his own knowledge, are true, & so far as they are stated to be upon information derived from others he believes them to be true.

ERWIN DAVIS.

Subscribed and sworn to before me this 10th day of Oct., 1889.

E. D. GRANT,
Notary Public (120), New York Co. [SEAL.]

And afterwards, to wit, on the 30th day of October, A. D. 1889, the following exhibit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

EXHIBIT.

In the Circuit Court of the United States for the District of West Virginia.

MERCANTILE TRUST CO.
vs.
THE KANAWHA AND OHIO RAILWAY CO. } In Equity.

209 This cause came on, this 21st day of August, 1889, to be heard at chambers, upon the motion of complainants for the appointment of a receiver of the defendant corporation upon the bill and exhibits filed therewith of the complainants and the affidavits of John W. Simpson and Robert W. Kelley, which motion was opposed by Erwin Davis, claiming that he was both an bondholder and stockholder of the defendant corporation, and that he was opposed to the confirmation of the receiver heretofore appointed by the circuit court of the United States for the southern district, eastern division of Ohio, which motion was argued by counsel of complainant as well as by counsel for Erwin Davis, and the court, not being advised at this time of its judgment upon said motion, takes time to consider thereof.

(Signed) JOHN M. HARLEM,
Circuit Justice.

(Signed) J. J. JACKSON,
Dist. Judge.

I, L. B. Dellicker, clerk of the United States circuit court for the district of West Virginia, do hereby certify that the foregoing is a true copy from the records in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at Charleston, in said district, this 8th of October, 1889, and in the 114th year of the Independence of the United States of America.

L. B. DELLICKER,
Clerk U. S. C. C., D. W. Va. [SEAL.]

210 And afterwards, to wit, on the 30th day of October, A. D. 1889, an order was made upon the order book of said court, clothed in the words and figures following, to wit:

Order Book A, p. 115.

The appearance of the defendant, The Kanawha and Ohio Railway Company, in the above cause having been entered and also that a subpœna issued in the above cause having been returned, which return has been filed, and it appearing, therefore, that the said appearance was duly entered, and that the said subpœna was

duly entered, and that the said subpœna was duly served on said The Kanawha and Ohio Railway Company, the defendant herein, and it further appearing that no plea, demurrer, or answer — filed on its behalf and the time for filing the same not having been enlarged, therefore, on motion of the complainant, by its counsel, it is ordered and decreed that the bill herein be taken *pro confesso* as to said defendant, The Kanawha and Ohio Railway Company.

And afterwards, to wit, on the 8th day of November, A. D. 1889, the following intermediate petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Intermediate Petition of Henry O'Bleness.

U. S. Cir. Court, Southern District of Ohio, Eastern Division.

211 THE MERCANTILE TRUST CO. *vs.* THE KANAWHA & OHIO RAILWAY COMPANY. } No. 479.

Intermediate petition.

And now comes Henry O'Bleness, and, by leave of the court *being* first had and obtained, files his intermediate petition herein and states that the said defendant, The Kanawha and Ohio Railway Company, is indebted to him in balance of $370.88 upon an account, of which a true copy is hereto attached, marked Exhibit "A," said indebtedness being for 51,555 brick laid in piers of bridge

No. 324, at $11 per thousand, making		$567 11
For irregular work to Nov., 1888		19 83
Making		586 94
Deduct amount of previous payments		278 59
Which leaves		308 35
Which sum has been approved and allowed by said railroad company by its voucher No. 136, and said railroad company is further indebted to the said Henry O'Bleness for 47,382 brick in piers of bridge No. 327, at $11 per thousand	$521 20	
For irregular work to Nov., 1888	10 41	
Making	531 61	
Deduct amount of previous payments	469 08	
Leaving a balance of		62 53
Making a total indebtedness from the said defendant, said railroad Co., to said Henry O'Bleness of		$370 88

with interest from the 15th day of Nov., 1888.

212 The said Henry O'Beleness therefore prays that the court do order, out of funds now in the hands of Robert W. Kel-

And afterwards, to wit, on the 30th day of October, A. D. 1889, the following exhibit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

EXHIBIT.

In the Circuit Court of the United States for the District of West Virginia.

MERCANTILE TRUST CO.
vs.
THE KANAWHA AND OHIO RAILWAY CO. } In Equity.

209 This cause came on, this 21st day of August, 1889, to be heard at chambers, upon the motion of complainants for the appointment of a receiver of the defendant corporation upon the bill and exhibits filed therewith of the complainants and the affidavits of John W. Simpson and Robert W. Kelley, which motion was opposed by Erwin Davis, claiming that he was both an bondholder and stockholder of the defendant corporation, and that he was opposed to the confirmation of the receiver heretofore appointed by the circuit court of the United States for the southern district, eastern division of Ohio, which motion was argued by counsel of complainant as well as by counsel for Erwin Davis, and the court, not being advised at this time of its judgment upon said motion, takes time to consider thereof.

(Signed) JOHN M. HARLEM,
Circuit Justice.

(Signed) J. J. JACKSON,
Dist. Judge.

I, L. B. Dellicker, clerk of the United States circuit court for the district of West Virginia, do hereby certify that the foregoing is a true copy from the records in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at Charleston, in said district, this 8th of October, 1889, and in the 114th year of the Independence of the United States of America.

L. B. DELLICKER,
Clerk U. S. C. C., D. W. Va. [SEAL.]

210 And afterwards, to wit, on the 30th day of October, A. D. 1889, an order was made upon the order book of said court, clothed in the words and figures following, to wit:

Order Book A, p. 115.

The appearance of the defendant, The Kanawha and Ohio Railway Company, in the above cause having been entered and also that a subpœna issued in the above cause having been returned, which return has been filed, and it appearing, therefore, that the said appearance was duly entered, and that the said subpœna was

duly entered, and that the said subpœna was duly served on said The Kanawha and Ohio Railway Company, the defendant herein, and it further appearing that no plea, demurrer, or answer — filed on its behalf and the time for filing the same not having been enlarged, therefore, on motion of the complainant, by its counsel, it is ordered and decreed that the bill herein be taken *pro confesso* as to said defendant, The Kanawha and Ohio Railway Company.

And afterwards, to wit, on the 8th day of November, A. D. 1889, the following intermediate petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Intermediate Petition of Henry O'Bleness.

U. S. Cir. Court, Southern District of Ohio, Eastern Division.

211 THE MERCANTILE TRUST CO. *vs.* THE KANAWHA & OHIO RAILWAY COMPANY. } No. 479.

Intermediate petition.

And now comes Henry O'Bleness, and, by leave of the court *being* first had and obtained, files his intermediate petition herein and states that the said defendant, The Kanawha and Ohio Railway Company, is indebted to him in balance of $370.88 upon an account, of which a true copy is hereto attached, marked Exhibit "A," said indebtedness being for 51,555 brick laid in piers of bridge

No. 324, at $11 per thousand, making		$567 11
For irregular work to Nov., 1888		19 83
Making		586 94
Deduct amount of previous payments		278 59
Which leaves		308 35
Which sum has been approved and allowed by said railroad company by its voucher No. 136, and said railroad company is further indebted to the said Henry O'Bleness for 47,382 brick in piers of bridge No. 327, at $11 per thousand	$521 20	
For irregular work to Nov., 1888	10 41	
Making	531 61	
Deduct amount of previous payments	469 08	
Leaving a balance of		62 53
Making a total indebtedness from the said defendant, said railroad Co., to said Henry O'Bleness of		$370 88

with interest from the 15th day of Nov., 1888.

212 The said Henry O'Beleness therefore prays that the court do order, out of funds now in the hands of Robert W. Kel-

ley, as receiver of said railroad company, or funds which may hereafter come into his hands, that the aforesaid indebtedness be paid to the said Henry O'Bleness, and that all his rights and equities in the premises may be preserved and protected by the court.

L. M. JEWETT,
Solicitor for Henry O'Bleness.

THE STATE OF OHIO, }
Athens County, } ss:

L. M. Jewett, being first duly sworn, deposes and says that he is the attorney and solicitor of the said Henry O'Bleness; that said Henry O'Bleness is now absent from the eastern division of the United States circuit court of the southern district of Ohio, and that affiant is the attorney of record of said Henry O'Bleness, and that the facts stated in the foregoing intermediate petition are true, as affiant believes.

L. M. JEWETT.

Subscribed in my presence and sworn to before me this 25th day of October, 1889.

S. E. HEDGES,
Clerk of Court of Common Pleas of Athens County, Ohio,
By WM. L. BROWN, *Deputy.* [SEAL.]

213 EXHIBIT A.

Henry O'Bleness in account with the Kanawha & Ohio R'y Company.

DR.		CR.		
		1888.		
To balance.....	370 88	Nov. —. By vou. # 136, for 51,555 brick laid in piers of bridge # 324, 11.00 per M.....	567 11	
		Irregular work to date.....	19 83	
			568 94	
		Deduct am't of previous payments.....	278 59	
				308 35
		By vou. # 137, for 47,382 brick, work in piers of bridges # 327, 11.00 per M..	521 20	
		Irregular work to date.....	10 41	
			531 61	
		Deduct am't of previous payments.....	469 08	
				62 53
	370 88			370 88
		By balance.....		370 88

214 And afterwards, to wit, on the 8th day of Nov., A. D. 1889, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

Circuit Court of the United States for the Southern District of Ohio, Eastern Division, *ss:*

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA & OHIO RAILWAY CO. } Cost Bond. # 479.

I hereby acknowledge myself security for costs in this case.
L. M. JEWETT. [SEAL.]

Taken and acknowledged before me this — day of Sept., ——.
——— ———,

[SEAL.] *Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, L. M. Jewett, a resident of said district, do solemnly
215 swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.
L. M. JEWETT.

Sworn to and subscribed before me this 7th day of November, A. D. 1889.
B. R. COWEN,
[SEAL.] *Clerk* Clerk *U. S. Circuit Court, S. D. O.*

And afterwards, to wit, on the 8th day of Nov., A. D. 1889, the following petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Intermediate Petition of E. S. Bright.

U. S. Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA & OHIO RAILWAY COMPANY. } No. 479.

Intermediate petition.

And now comes Emmens S. Bright, a resident of the State of West Virginia, and, upon leave of the court had and obtained, files his intermediate petition herein and states that on the first day of February, 1888, he entered into a contract with the said Kanawha & Ohio Railway Company, of which the following is
216 a true copy, to wit:

"This agreement made and entered into, this first day of February 1888 by and between E. S. Bright, of Brighton West Va., hereinafter called the party of the first part, and the Kanawha and

Ohio Railway Company, hereinafter called the party of the second part, witnesseth:

First. The party of the first part hereby agrees to furnish to the party of the second part not less than sixty thousand (60,000) nor more than seventy-five thousand (75,000) railroad cross-ties between the date hereof, and the first day of November 1888 in accordance with the following specifications and on the terms and conditions hereinafter set forth;

A. All of the ties furnished under this agreement shall be made from sound standing timber from white post or chestnut oak, and cut while sap is out. They shall be straight, of even and uniform thickness throughout and of the length specified. Not less than fifty per cent. (50 %) shall be hewed ties. The hewed ties shall be neatly hewn, free from score hacks, have all the back removed, and conform in every other respect to the specifications herein given.

B. First-class ties must be not less than six (6) inches thick not less than seven (7) inch face and not more nor less than eight (8) feet in length.

C. Second-class ties must be not less than six (6) inches thick, not less than six (6) inch face, and not more nor less than eight (8) feet in length.

217 D. All coming below the specifications for second-class ties are to be rejected and will not be paid for.

E. Not less than eighty per cent. (80 %) of the *this* delivered under this agreement shall be first class and conform in every respect to the specifi-ations for first-class ties.

F. One-half of the ties to be furnished under this agreement are to be delivered by the party of the first part along the line of the railroad of the party of the second part between Middleport, Ohio, and Corning Ohio, and the other one-half between Charleston, W. Va. and Point Pleasant W. Va. and all of them must be placed or piled in such manner as to be convenient for inspection and loading.

G. The ties are to be delivered in such quantities each month as the road master of the party of the second part may direct or require.

H. The ties are to be inspected and taken up once a month and on such day or days in each month as will be convenient to the road master of the party of the second part to inspect and receive them.

I. It is distinctly understood and agreed to by the party of the first part that the inspection of the road master of the party of th- second part is to govern and that there shall be no appeal from his inspection.

Second. The party of the second part her-by agrees to receive from the party of the first part not less than sixty thousand (60,000) nor more than seventy-five thousand (75,000) ties in accordance with the above specifications and on the terms and conditions hereinbefore set forth, between the date hereof and the first

218 *first* day of Nov. 1888, and to pay for the same at the rate of thirty-five cents (35c.) per tie for first-class ties and twenty-

five cents (25c.) per tie for second-class ties, payments to be made monthly in instalments of not exceeding two thousand dollars ($2,000) in any one month. Each installment to be due and payable on the 25th of the month next succeeding that on which the ties have been inspected and received.

In witness whereof the parties hereto have subscribed their names on the day and year first above written.

E. S. BRIGHT.
THE KANAWHA AND OHIO R'Y CO.,
By M. SWANEY, *Gen. Sup't.*"

Petitioner states that under said contract he furnished labor and material for said railroad as shown in the following statement, to wit:

BRIGHTON, W. VA.

Kanawha & Ohio R'y to E. S. Bright, Dr.

1888.			
Feb.	28.	To 5,438 No. 1 ties at .35.....	$1,903 30
Feb.	28.	To 974 No. 2 ties at .25.....	243 50
May	2.	To 9,223 No. 1 ties at .35.....	3,228 05
May	2.	To 1,182 No. 2 ties at .25.....	295 50
June	2.	To 6,029 No. 1 ties at .35.....	2,110 15
June	2.	To 490 No. 2 ties at .25.....	122 50
	June	2. To 15,236 No. 1 ties at .35.	5,332 60
219	June	2. To 1,396 No. 2 ties at .25...	349 00
	Aug.	31. To 11,934 No. 1 ties at .35.	4,176 90
Aug.	31.	To 1,296 No. 2 ties at .25....	324 00
Oct.	1.	To 5,770 No. 1 ties at .35.....	2,019 50
Oct.	1.	To 383 No. 2 ties at .25.....	95 75
Nov.	30.	To 570 No. 1 ties at .35.....	199 50
Nov.	30.	To 104 No. 2 ties at .25.....	26 00
Dec.	27.	To building depot at Rutland, O..	600 00
			$21,026 25

1888.			
April	28.	By cash.....	$2,000 00
May	29.	By cash.....	2,000 00
July	5.	" "	2,000 00
Aug.	18.	" "	2,000 00
Sept.	5.	" "	2,000 00
Oct.	6.	" "	2,000 00
Nov.	6.	" "	2,000 00
1889.			
Jan.	9.	" "	2,000 00
			$16,00– 00
		Amount due E. S. Bright.....	$5,026 25

220 The said railroad ties in the statement last above given being furnished under said contract, and the item of Dec. 27,

1888, for building a depot at Rutland, Ohio, $600, was furnished, performed, and built under and by virtue of a contract made shortly prior to said date with said railroad company in writing.

Petitioner stated that he has in all respects performed all the conditions of said contract upon his part to be performed, and there now remains due and unpaid to him upon the aforesaid indebtedness the sum of $5,026.25, with interest from Dec. 1, 1888, and said sum remains unpaid in whole or in part, and said railroad company, although often requested to pay the same, has not paid said sum of money or any part thereof.

Petitioner avers that said railroad company has accepted the said work from this petitioner and has made the payments thereon set forth in the above statement.

The said Emmens S. Bright therefore prays the court to order, out of funds now in the hands of Rob't W. Kelley as receiver of said railroad company or funds which may hereafter come into his hands, that the aforesaid indebtedness be paid to the said Emmons S. Bright, and that all of his rights and equities in the premises may be preserved and protected, and for all other and further relief as equity and nature of the case may require.

L. M. JEWETT,
Solicitor for Intermediate Petitioner, Athens, Ohio.

THE STATE OF OHIO, }
Athens County, } *ss:*

L. M. Jewett, being first duly sworn, deposes and says that he is the attorney and solicitor of the said Emmons S. Bright;
221 that said Emmons S. Bright is a resident *is a resident* of the State of West Virginia and is now absent from this district, and affiant is one of the attorneys of record, and that the facts stated in the foregoing-named action are true, as affiant believes.

L. M. JEWETT.

Subscribed in my presence and sworn to before me this — day of November, 1889.

CHAS. H. MINTUN,
Notary Pub., Athens County, Ohio. [SEAL.]

And afterwards, to wit, on the 8th day of November, A. D. 1889, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

222 Circuit Court of the United States for the Southern District of Ohio, Eastern Division, *ss:*

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA & OHIO RAILWAY CO. } Cost Bond. #479.

I hereby acknowledge myself security for costs in this case.

L. M. JEWETT. [SEAL.]

Taken and acknowledged before me this 7th day of November, 1889.

——— ———,

[SEAL.] *Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, L. M. Jewett, a resident of said district, do solemnly
223 swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

L. M. JEWETT.

Sworn to and subscribed before me this 7th day of November, A. D. 1889.

B. R. COWEN,

[SEAL.] *Clerk U. S. Circuit Court, S. D. O.*

And afterwards, to wit, on the 13th day of November, A. D. 1889, the following order was entered upon the order book of said court, clothed in the words and figures following, to wit:

Order Book A, p. 115.

This cause came on to be heard upon the petition of Erwin Davis, filed herein October 30, 1889, and his motion thereof for the removal of Robert W. Kelley from his position as receiver herein and the appointment of another in his stead, and upon the affidavit of Robert W. Kelley. After hearing J. B. Jackson, counsel for the petitioner, and John E. Kenna and Thomas Thatcher, counsel for the complainant, and George S. Couch, counsel for the Kanawha and Ohio R'y Co., and due consideration being had—

It is ordered that said motion of said Erwin Davis be, and is hereby, denied.

It is further ordered that said Erwin Davis be and is permitted to intervene herein, and that he have liberty to be heard
224 upon any and all proceedings herein for the protection of his interests as bondholder and stockholder of the Kanawha and Ohio Railway Company.

225 And afterwards, to wit, on the 18th day of November, A. D. 1889, the following petition of the Atlantic Trust Company was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition of Atlantic Trust Company.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY OF NEW YORK
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY. } In Equity.

To the judges of the circuit court for the southern district of Ohio:

The petition of the Atlantic Trust Company of New York respectfully shows that it is a corporation duly organized and existing under and pursuant to the laws of the State of New York; that heretofore the Kanawha and Ohio Railway Company, therein called the lessee, duly made an agreement under seal to and with Robert Seney, trustee, of the city, county, and State of New York, therein called the lessor, dated the 14th day of October, 1887; that by the terms of said agreement said lessor thereby leased to the
226 lessee and the lessee hired thereby from the lessor two hundred box cars built by the Pullman Palace Car Company and numbered 600 to 799, inclusive, for the term of eight years from the 1st day of November, A. D. one thousand eight hundred and eighty-seven.

That the said lessee also agreed therein to pay to the lessor or his assigns, at its financial agency in the city of New York, as rent for said cars certain sums of money, to wit, on the execution and delivery of said lease the sum of $55,170, and on the 1st day of November, 1888, the sum of $8,000, and thereafter the sum of $8,000 on the 1st days of November, 1889, 1890, 1891, 1892, 1893, 1894, and 1895, and on the 1st days of May and November in each year beginning with the 1st day of May, 1888, a further sum equal to the half-yearly interest at the rate of 7 % per cent. per annum on the total amount of said yearly payments remaining unpaid.

That, as evidence of its liability to pay said installments and the interest thereon, the said lessee agreed to execute and deliver to the lessor simultaneously with the delivery of said cars its bonds for the principal sum in the aggregate of $64,000, payable in instalments as above set forth at said financial agency, having coupons attached, payable semi-annually at said financial agency, representing the interest agreed to pe paid.

Said agreement further provided that the said sum so to be paid as interest semi-annually should be applied to the payment of the coupons then maturing, and that the instalments for principal should be applied to the payment of the bonds maturing on the 1st day of November in each year respectively.

It was further therein provided that in case of default in payment of any instalment of rent or interest on the day when the
227 same should fall due, or in case of failure on the part of the *of the* lessee to make any payments that might be due for taxes or for insurance premiums on said cars or to perform any of

the agreements therein entered into by it, the lessor should have the right to enter upon the premises of the said railway company and remove therefrom any and all cars which should have been delivered to it and with or without notice to sell and to apply the proceeds to the payment of any and all installments of rent for said cars for the whole of said term, whether said installments should then have fallen due or not and notwithstanding the said cars rented had been taken possession of and sold prior to the expiration of the said agreement.

It was further agreed that in case the said railway company, lessee, should pay all sums covenanted to be paid by it in said lease and should perform the stipulations thereof on its parts and should further pay the lessor — his successors within 30 days after the expiration of said term, then and in that case said cars should become and be the absolute property of the lessee without further act of transfer from the lessor, but that until all the sums therein agreed to be paid by the lessor should be duly paid, together with the further payment of ten cents per car, the said cars should remain the property of the lessor, his successor and assigns, and that no right whatever thereto should pass to the lessee except that of using the same under said lease.

It was further therein provided that the lessor might at any time assign and convey his interest in said cars and said agreement of lease and his powers, rights, privileges, and remedies thereunder, and that any such sale and assignment should vest in the assignee all the property, rights, powers, and remedies then held by
228 the said assignor and lessor, but that the said lessor and any persons or corporation to whom he might sell or assign said cars and his rights, powers, privileges, and remedies thereunder should hold the same as trustee for the persons, firms, and corporations who might from time to time become the holders of bonds and coupons to be issued as therein provided.

Your petitioner further shows that simultaneously with or shortly after the time of the execution of the said lease the said Robert Seney delivered to the said railway company 200 box cars, numbered from 600 to 799, inclusive, and that said cars were delivered upon the approval of the said Seney and the said railway company and were taken possession of by said railway company and have been since that time and up to the present time continuously in use by it.

That in consideration of the delivery of said cars and as rent therefor the railway company executed and delivered to the said Seney, trustee, its bonds for the principal sum of f $64,000 as evidence of said yearly payments of $8,000 each, with coupons attached representing the semi-annal interest thereon as hereinabove set forth.

That by the terms of each of said bonds the said railway company promised to pay to the bearer one thousand dollars in United States gold coin of the then standard of weight and fineness at its financial agency in the city of New York and to pay the coupons attached thereto for interest at the rate of 7% per annum on said

bonds upon presentation of said coupons at said agency in the city of New York on the first days of May and November in each year until the principal sums evidenced by said bonds respectively should be paid.

That by the terms of said bonds eight thereof matured annually, to wit, on the 1st days of November, 1888, 1889, 1890,
229 1891, 1892, 1893, 1894, and 1895.

That since the issue thereof said bonds have been sold upon the market and have been bought and are now held and borne by the holders or holder for value, and that fifty-six of said bonds, each for the principal sum of one thousand dollars, together with all the coupons belonging thereto maturing on and after May 1st, 1889, are outstanding and unpaid.

That by an instrument of assignment dated the 8th day of May, 1888, Robert Seney, the trustee in said agreement of lease named, in consideration of the premises and of one dollar to him in hand paid by your petitioner, sold, assigned, and transferred his interest in said cars and in said agreement of -ease and his rights, powers, privileges, and remedies thereunder unto your petitioner, its successors and assigns forever, intending thereby to invest in your petitioner all the property, rights, powers, privileges, and remedies then held, owned, or possessed by the said Seney in respect to the said cars with the same effect as if said agreement had originally been made between your petitioner and the said railway company, your petitioner holding the same as trustee for the holders and bearers of said bonds as in said agreement provided; that copies of said lease and said assignment are hereto annexed, marked Exhibits A and B.

230 Your petitioner further says that on or shortly after the 1st day of November, 1889, the eight bonds which matured on that day, each for the sum of $1,000, were presented to the financial agency of said lessee in the city of New York, and payment thereof was duly demanded and tender was made of said bonds; that the same were not paid, nor was any part of the money evidenced thereby, and the same remain and are wholly unpaid; that, as your petitioner is informed and charges, the said railway company was at that time insolvent and had not made any provision whatsoever for the payment of the said bonds.

Your petitioner further alleges that the said two hundred cars are now in the charge and custody of this honorable court and are controlled and operated by its receiver, who was heretofore duly appointed and who, as such receiver, is for the time being the successor of said railway company, lessee.

That demand has been made upon the said receiver for the payment of the said principal sum of $8,000 in arrear, but that the same has not been paid, and that like demand has been made upon *upon* him for delivery to your petitioner of the said cars so leased, but delivery thereof has not been made.

231 Wherefore your petitioner prays that the said receiver may be ordered by this court to pay to your petitioner the amount of coupons now in arrear and unpaid, or that he may be directed to

deliver unto your petitioner the said cars so leased, and that your petitioner may have such other and further relief as may be just.

THE ATLANTIC TRUST COMPANY,
By W. H. MALE, *President.*

STATE OF NEW YORK,
City and County of New York, Southern District of New York, } ss:

W. H. Male, being duly sworn, says that he is the president of the said petitioner above named; that the allegations in the foregoing petition are true to the best of deponent's knowledge, information, and belief.

W. H. MALE.

Sworn to before me this 11 day of Nov., 1889.

DAVID REMBOLD,
Notary Public, N. Y. Co. [SEAL.]

232 EXHIBIT "A."

This agreement, made this 14th day of October A. D. 1887, by and between Robert Seney, trustee, of the city, county and State of New York, party of the first part, (hereinafter called the lessor), and The Kanawha and Ohio Railway Company, a corporation of the States of Ohio and West Virginia, party of the second part, (hereinafter called the lessee).

Witnesseth, as follows, to wit:

First. The lessor hereby leases to the lessee, and the lessee hereby hires from the lessor, two hundred box cars, of twenty-five tons capacity each, built by the Pullman Palace Car Company and numbered from 600 to 799 inclusive, for the term of eight years from the first day of November A. D. one thousand eight hundred and eighty-seven.

Second. Said cars are to be built according to the specifications referred to in the contract therefor between the lessor and the Pullman Palace Car Company, to which specifications reference is here had and are to be subject to the approval of an inspector agreed upon by the parties hereto. The said cars are to be delivered to the lessee at Pullman, Illinois, at the times provided for the delivery thereof to the lessor, under his contract with the makers thereof, to which reference is here had, it being expressly agreed, that the lessor shall not be liable for any delay in the delivery of said cars or any of them, attributable to the makers thereof; but for any damages suffered by the lessee, by reason of such delay, said lessee shall be entitled to all the benefits secured to the lessor by
233 his contract with the makers and in respect thereof shall be subrogated to all the rights and remedies of the lessor. The lessee shall be bound, as from time to time said cars are completed and ready for delivery to have an agent at Pullman, with authority to receive and receipt for the said cars, and the receipt of said agent shall be final and conclusive evidence of the acceptance by the lessee of the cars receipted for, and of their delivery to the lessee.

Third. The lessee agrees to pay to the lessor, or his assigns, at its financial agency in the city of New York as rent for said cars, the following sums, to wit:

I. The sum of fifty-five thousand one hundred and seventy dollars on the execution and delivery of this agreement, the receipt of which is hereby acknowledged.

II. On the first of Nov. A. D. 1888, the sum of eight thousand dollars ($8,000).

On the 1st day of Nov. A. D. 1889, the sum of $8,000.
On the 1st day of Nov. A. D. 1890, the sum of $8,000.
On the 1st day of Nov. A. D. 1891 the sum of $8,000.
On the 1st day of Nov. A. D. 1892 the sum of $8,000.
On the first day of Nov. A. D. 1893, the sum of $8,000.
On the 1st day of November A. D. 1894, the sum of $8,000.
On the 1st day of November A. D. 1895, the sum of $8,000.

III. On the first da-s of May and November in each year beginning with the first day of May one thousand eight hundred and eighty-eight, a further sum equal to the half-yearly interest at the rate of seven per cent. per annum, on the total amount of said yearly payments of eight thousand dollars each remaining unpaid.

234 The lessee further promises and agrees to pay all taxes that may, at any time, be levied or assessed upon said cars, or any of them, or upon the obligations for rent hereby entered into by the lessee, as and when the same shall become due and payable.

Fourth. The lessee shall execute and deliver to the lesor, simultaneously with the delivery of the cars, its lithographed bonds for the principal sum in the aggregate of sixty-four thousand dollars, as evidence of said yearly payments of eight thousand dollars each, which said bonds shall have coupons attached, representing the interest upon said yearly payments hereinbefore agreed to be paid by the lessee.

The said bonds (which shall be for one thousand dollars each) and the said coupons, shall be substantially in the terms and form following respectively, to wit:

UNITED STATES OF AMERICA, *States of Ohio and West Virginia.*

The Kanawha and Ohio Railway Company.

Seven per Cent. Equipment Bond.

No. —. Series A. $1,000.

For value received, the Kanawha and Ohio Railway Company promises to pay to the *h*earer one thousand dollars in gold coin of the United States of the present standard of weight and fineness, at its financial agency in the city of New York, on the first day of November, A. D. one thousand eight hundred and —, and on presentation and surrender of the annexed coupons, as they shall severally become due, to pay interest thereon at the rate of seven per cent., per annum, from the first day of November, A. D. one

thousand eight hundred and eighty-seven, payable in like coin, at said agency on the first days of May and November, in
235 each year until such principal sum shall be paid.

This bond is one of a series of sixty-four bonds of lik- *like* import and amount, known as the Kanawha and Ohio Railway Company's equipment bonds, series A, which with the coupons thereto attached, represent the rental, for a term of eight years, of two hundred box cars, number 600 to 799 inclusive, under an agreement of lease bearing date the 14th day of October, A. D. 1887, between Robert Seney, trustee, and the said railway company, of which bonds eight become due and payable on November 1st, A. D. one thousand eight hundred and eighty-eight, and eight on each first day of November, thereafter, until all have become due and payable.

The said agreement provides, that in case of default in the payment of any of the sums of money above specified, on the day when the same falls due, or in case the said railway company shall violate said agreement in any respect whatever, the trustee herein, and his successors, shall have the right, at his or their option, to enter upon the premises of said railway company, and to remove therefrim any and all said cars, which shall have been delivered to said railway company and to sell the same, at public or private sale, and apply the proceeds to the payment of said bonds, and if there shall be any deficit, that the said railway Co. shall pay the same on demand.

It is further provided in said agreement, that said railway company shall, at its own expense, keep said cars in good repair, and fully insured any loss being payable to said trustee for the holders of said bonds.

In witness whereof, the said railway company has caused its corporate seal to be hereunto affixed, attested by its secretary, and this bond to be signed by its president, the — day of October, A. D. 1887, and has hereto attached coupons with the name of its treasurer engraved thereon.

236 [SEAL.] THE KANAWHA AND OHIO RAILWAY COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

$35.00. *Coupon.* No. —.

The Kanawha and Ohio Railway Company, upon presentation and surrender of this coupon, will pay thirty-five dollars to the bearer at its financial agency in the city of New York, on the 1st day of ——, A. D. 18—, being six months' interest on its equipment bond No. —, of series A.

—— ——, *Treasurer.*

Fifth. The sums to be paid by the lessee as aforesaid semi-annually on the first days of May and November in each year of the said term shall be applied to the payment of such of the said coupons as

shall mature and fall due on such days respectively, and shall be paid directly to the holders of such coupons, and, such payment having been made, the coupons so paid shall be cancelled and surrendered to the lessee; and the said sums of eight thousand dollars to be paid by the lessee as aforesaid on the first day of November in each year during said term shall be applied to the payment of such of the said bonds as shall mature and fall due on such days respectively and shall be paid directly to the holders of such
237 bonds, and, such payment having been made, the bonds so paid shall be cancelled and surrendered to the lessee.

Sixth. The lessee shall keep said cars in good repair and condition and shall replace any car destroyed by a new one with the same mark and number, such repair and maintenance to be done to the satisfaction of the lessor or his agent or assignees. At all times the name, number, plate, or mark or sign of the ownership of the lessee, to wit, "Robert Seney, trustee, owner," shall be fixed and retained upon each of said cars aforesaid for the purpose of making the ownership thereof publicly known, and in the event of any such marks or signs being destroyed or removed the lessee shall immediately restore the same; and the lessee expressly agrees not to cause — to allow to be painted or marked upon any of said cars the name of any railway company unless and except with the addition of the word "lessee" wherever such name appears in plain and conspicuous characters; and it is agreed that such other things shall be done as by counsel of the lessor shall be deemed necessary or expedient for the full and complete protection of his rights in the said cars as the owner thereof.

Seventh. The lessee shall at its own expense keep the said cars insured against fire to the amount of the unpaid rental and purchase-money due thereon or therefor, and the policies for such insurance shall provide in proper terms that the loss, if any, shall be payable to the lessor for the benefit of the holders of the said bonds and coupons as his or their interest may appear, and the lessee shall replace any car destroyed or injured by fire, in which case the lessor shall pay to the lessee the amount of insurance collected for such loss; and in case the lessee shall fail to insure the said cars or any of them or shall fail to pay the taxes thereon as and when the same shall become due and payable, as hereinbefore provided, the
238 lessor may take out such insurance and pay such taxes and charge the costs thereof to the lessee, which charges shall be of the same rank with the principal and interest of the rental hereinbefore agreed to be paid, and enforceable in case of default in the manner set forth in clause ninth hereof for the enforcement of the payment of said rental.

Eighth. The lessor and his assigns shall have the right at any time during the said term, but not oftener than once in six months, to make an inspection of the said cars for the purpose of ascertaining their condition, and the lessee shall pay the costs of such inspections.

Ninth. In case of default in the payment of any instalment of rent or interest thereon, as hereinbefore provided, on the day on

which the same falls due hereunder, or in case of failure on the part of the lessee to make any of the payments or perform any of the agreements herein entered into by it, the lessor shall have the right to enter upon the premises of the lessee and to remove therefrom any and all cars which shall have been delivered to the lessee hereunder, and with or without notice to sell the same at public or private sale and apply the proceeds of such sale to the payment of any and all instalments of rent for said cars for the whole of said term, whether said instalments shall then have fallen due or not and notwithstanding that said cars shall have been taken possession of and removed and sold prior to the expiration of this lease. If the proceeds of such sale be more than sufficient to pay such unpaid instalments of rent, with interest to the time of sale and expenses and the other sums of money then due from the lessee to the lessor by the terms hereof, then the surplus shall be paid to the lessee, its successors or assigns; but if there be any deficit the lessee shall and hereby promises and agrees to pay such deficit to the lessor on demand.

239 Tenth. And the lessee agrees, in case the lessor shall seize the said cars or any of them for any violation of the provisions of this agreement, on demand of the lessor to place all of said cars so seized upon any of its side tracks designated by the lessor and hold the same, without use or charge, subject to the order of the lessor or his *against* and on direction of the lessor and at the expense of the lessee to transport such cars to any other point designated by the lessor, whether on the line of railroad of the lessee or elsewhere.

Eleventh. It is further hereby agreed that in case the lessee shall duly pay all the sums herein agreed to be paid by it and perform the stipulations of this agreement on its part, and shall further pay the lessor, his successors or assigns, the sum of ten cents for each and every of said cars within thirty days after the expiration of said term, then and in that case the said cars shall become and be the absolute property of the lessee without any further act of transfer or conveyance from the lessor; but until all the sums herein agreed to be paid by the lessee shall have been duly paid and the further payment of ten cents per car shall have been duly made the said cars shall remain the property of the lessor, his successors and assigns, and no right whatever thereto shall pass to the lessee except that of using the same in strict compliance with the terms of this agreement.

Twelfth. The lessor may at any time sell and assign his interest in the said cars and this agreement of lease and his rights, powers, privileges, and remedies thereunder, and any such sale and assignment shall vest in the assignee, and the assignee shall have
240 and possess all the property, rights, powers, and remedies which are now held, owned, or possessed by the lessor in respect to the said cars with the same effect as if this agreement had originally been made between such assignee and the lessee.

And the lessor and any person or corporation to whom he may sell or assign said cars and this lease and his rights, powers, privi-

leges, and remedies thereunder shall hold the same as trustee for the persons, firms, and corporations who may from time to time become the holders of the bonds and coupons to be issued as hereinbefore provided.

In witness whereof the said lessor has hereto set his hand and seal, and the said lessee has caused its corporate seal to be hereto affixed, attested by its secretary; and these presents to be signed by its president the day and year first above written, these presents being executed in duplicate.

ROBERT SENEY, *Trustee.* [SEAL.]
KANAWHA AND OHIO R'Y CO.,
[SEAL.] By NELSON ROBINSON, *President.*

Signed, sealed, and delivered in presence of—
JOHN W. SIMPSON.
WM. M. BARNUM.

The above is the true corporate seal of the Kanawha and Ohio Railroad Company.

Teste:
E. B. LELAND,
Sec'y of the Kanawha and Ohio R. R. Co.

Endorsed: Filed for record Oct. 25, 1887. J. S. Robinson, sec'y of state. Recorded in vol. 41, p. 240, of the records of incorporations. J. S. Robinson, sec'y of state.

241 EXHIBIT B.

Instrument made this eighth day of June A. D. 1888, by and between Robert Seney, trustee, of the city, county, and State of New York, party of the first part, and the Atlantic Trust Company, a corporation organized under the laws of the State of New York, party of the second part.

Whereas, an agreement was heretofore made dated the 14 day of October, 1887, by and between the party of the first part and the Kanawha and Ohio Railway Company, whereby the party of the first part leased to the said railway company, and the said railway company hired from the said party of the first part two hundred box cars of twenty-five tons capacity each, built by the Pullman Palace Car Company, and numbered from 600 to 799, inclusive, for the term of years therein stated, and under certain stipulations and agreements therein expressed, which agreement was on the 19th day of October, 1887, delivered to the secretary of state of the State of West Virginia in his office as such secretary of state, and admitted to record therein, being recorded in Corporation Book B, folio 384, *et seq.;* and

Whereas said agreement provides for the issue by the said railroad company of certain bonds, with coupons attached, as evidence of the yearly payments to be made by said railway company under said agreement and of the interest upon said yearly payments; and

Whereas it is in said agreement provided that the party of the

first part, the lessor therein, may, at any time, sell and assign his interest in the said cars and said agreement of lease, and his rights,
powers, privileges, and remedies thereunder, and that any
242 such sale and assignment shall vest in the assignee, and the
assignee shall have and possess all the property, rights, powers, and remedies held, owned, or possessed by the said lessor in respect to the said cars, with the same effect as if this agreement had originally been made between such assignee and the said railway company, the lessee therein; and further provides, that the said lessor or any person or corporation to whom he may sell or assign such cars and said lease and his rights, powers, privileges, and remedies thereunder, shall hold the same as trustee for the persons, firms, and corporations who may from time to time become the holders of the bonds and coupons to be issued as therein provided.

Now therefore, this instrument witnesseth:

That, in consideration of the premises and one dollar in hand paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part doth hereby sell and assign his interest in the said cars, and said agreement of lease, and his rights, powers, privileges and remedies thereunder, unto the said party of the second part its successors and assigns, forever, intending hereby to vest in the party of the second part, all the property, rights, powers privileges and remedies now held, owned or possessed by the party of the first part in respect to the said cars, with the same effect as if said agreement had originally been made between the party of the second part and the said railway company, the said party of the second part to hold the same as trustee as in said agreement provided.

In witness whereof, the said party of the first part has hereto set his hand and seal the day and year first above written.

(S'd)) ROBERT SENEY, *Trustee.* [L. S.]

243 Signed, sealed, and delivered in the presence of—
PHILIP G. BARTLETT.

This is to certify that the Kanawha and Ohio Railway Company takes note of and assents to the foregoing assignment.

Witness its corporate seal, attested by its secretary and the signature of its president, this — day of May, 1888.

KANAWHA AND OHIO RAILWAY COMPANY.

(S'd) ROBERT W. KELLEY, *Pres't.* [L. S.]

Attest: (S'd) W. B PALMER, *Sec'y.* [L. S.]

CITY AND COUNTY OF NEW YORK, *ss:*

On this eighth day of June, 1888, before me personally came *to me* Robert Seney, personally to me known and known to me to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

(S'd) PHILIP G. BARTLETT,
Notary Public, New York County.

244 And afterwards, to wit, on the 5th day of December, A. D. 1889, the following petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition of Erwin Davis.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, a Corporation,
vs.
THE KANAWHA AND OHIO RAILWAY CO. *et al.*
} In Equity.

To the honorable the judges of said court:

Your petitioner, Erwin Davis, respectfully represents unto your honors:

I. That The Mercantile Trust Company, complainant in the above-entitled cause, on the 24th day of July, 1889, filed in this honorable court its bill against the above-named defendants, in which said bill it was charged "that on or about the first day of May, in the year 1886, said The Kanawha and Ohio Railway Company duly made and executed its certain bonds, dated on that day, each for the payment to bearer or in case of registry to the registered owner of one thousand dollars in gold coin of the United States of *of* the then present standard of weight and fineness at the office or agency of said company in the city of New York on the first day of January, 1936, and for the payment, *or* presentation and surrender of the annexed coupons as they should severally become due, of interest thereon, at the rate of six per centum per annum, from
245 the first day of July, 1886, until such principal shall be paid, such interest being payable in like coin at said office or agency on the first days of January and July in each year, the said bonds and coupons being in the forms shown in the mortgage hereinafter referred to."

II. "That to secure the payment of the principal and interest of said bonds the said The Kanawha and Ohio Railway Co. on or about the first day of May, 1886, duly made, executed, and delivered to the said The Mercantile Trust Company its certain mortgage or deed of trust dated on that day and thereby conveyed to the said The Mercantile Trust Company, as trustee, and its successors and assigns the property and rights described as follows: All and singular the railroad of the said The Kanawha and Ohio Railway Company, extending from a point in the village of Corning, in the township of Monroe, in the county of Perry, in the State of Ohio, through the counties of Perry and Athens, by way of Jacksonville, to a point within or near South Shawnee, in said county of Perry, and through or into the counties of Perry, Athens, Meigs, and Gallia, by way of Athens and Middleport, to a point on the Ohio river opposite to the village of Point Pleasant, in the State of West Virginia, and thence across the Ohio river and through the counties of

Mason, Putnam, Kanawha, and Fayette, by way of Charleston, and in general along or near the northeasterly bank of the Kanawha river to a point at or near the mouth of Gauley river, in said county of Fayette, in said State of West Virginia, constructed or to be constructed and as the same then was or might thereafter be located and whether then acquired or to be thereafter acquired, including all and
singular the railroad, lands, and other property which were
246 conveyed to the Ohio and Kanawha Railway Company, by Erwin Davis and Emily B., his wife, Albert Gallup and Edward C. Mohams and Francis E., his wife, by deed dated the 29th day of January, 1886, and including also all and singular the railroad, lands, and other property (except the coal lands and mineral rights in Raleigh county) which were conveyed to the Kanawha and Ohio R'y Co., a corporation of the State of West Virginia, by the said Erwin Davis and Emily B., his wife; Albert Gallup and Edward C. Homans and Francis E., his wife, by deed dated the 29th day of January, 1886."

That there was also included in said mortgage or deed of trust all of the property then held or thereafter acquired by said railway company in connection with said railroad or for the use thereof, and also all rights, powers, privileges, and franchises connected with or relating to said railway and other property, including the rights to operate and maintain the same, and also estate, right, title, and interest which the said railway company then had or might thereafter acquire of, in, or to the railway bridge across the Ohio river at Point Pleasant, in the State of West Virginia, and the railway and other property appurtenant thereto.

It being therein provided, however, and said deed of trust or mortgage was expressed to be upon the express condition that if the said The Kanawha and Ohio Railway Company, its successors or assigns, should well and truly pay or cause to be paid the principal and interest to become due on the said bonds to be issued thereunder at the time and in the manner stipulated in said bonds and in said interest coupons according to the true intent and meaning thereof, and should well and truly keep and perform all and singular the covenants, promises, and conditions in said bonds and in said deed of trust or mortgage expressed as to be kept, observed,
and performed by or on the part of the said The Kanawha
247 and Ohio Railway Company, then the said mortgage or deed of trust and the estate and rights thereby granted should cease, determine, and be void; other-s to be and remain in full force; all of which fully appears by reference to said bill and the mortgage or *dered by* trust therewith filed.

III. It was further charged in said bill that said conveyance was made subject, however, as to part of said railroad to the lien of certain mortgages known as the Mineral Division mortgages of the Ohio Central Railroad Company therein described.

IV. It is further averred in said bill that said mortgage or deed of trust contains a covenant as follows: "The railway company hereby covenants, promises, and agrees to and with the trustee that it will forthwith deliver or cause to be delivered to the trustee bonds

and stock of the Point Pleasant Bridge Company representing, as herein appears; the entire property in the railway bridge at Point Pleasant and the railway and other property appurtenant thereto not conveyed by these presents, which bonds and stock are delivered to and are to be held by the trustees as security for the equal payment without preference of the bonds to be issued as aforesaid, in accordance with the true intent and meaning of the stipulations of this deed and of said bonds and interest coupons."

And it was thereupon averred in said bill that the said railway bridge at Point Pleasant, and its approaches, is used as a part of the line of road of the said The Kanawha and Ohio Railway Company, connecting its railroad in West Virginia with its railroad in Ohio; that said bridge was at the date of the mortgage or
248 *or* deed of trust aforesaid subject to the lien of a certain mortgage or deed of trust made by Erwin Davis and wife and John W. Simpson, of the first part, to Alexander M. White, William Augustus White, and Alfred T. White, of the second part, dated October 31, 1885, to secure the payment of two hundred thousand dollars and interest, but that this mortgage has since been paid and the lien thereof discharged.

That in accordance with the covenant above recited and contained in said mortgage or deed of trust of the Kanawha and Ohio Railway Company bonds of the said Point Pleasant Bridge Company for the principal sum in the aggregate of one million dollars secured by mortgage of said bridge company to John W. Simpson, as trustee, and stock of said bridge company of the par value of $998,000, being all of its stock except two thousand dollars in par value thereof, and said bonds and stock representing, except for the said $2,000 of stock and the mortgage to Alexander M. White and others, since paid and discharged, the entire property in said railway bridge and the railway and other property appurtenant thereto, were on or about the 2nd day of July, 1886, delivered to the complainant by Erwin Davis and John W. Simpson, to be held in accordance with said covenant and to be held and dealt with in accordance with a certain written agreement of that date, a copy of which is attached to the original bill in this cause and marked Exhibit B, and said bonds and stock are still held by complainant for such purpose.

V. That of said bonds of the Kanawha and Ohio Railway Company there have been duly issued for value and in accordance with the provisions of said mortgage and are now outstanding eleven hundred and sixty bonds for the principal sum, in the aggre-
249 gate, of $1,116,000, besides which there are reserved by the trustee and withheld from issue in its custody and possession (except for the purpose of paying or retiring the bonds secured by said Mineral Division mortgage) one hundred and eleven of said bonds for the principal sum in the aggregate of 111,000.

VI. It is further averred in said bill that on the first day of January, 1889, there became due and payable upon the said bonds of the Kanawha and Ohio Railway Company a semi-annual instalment of interest evidenced by the interest warrants or coupons at-

tached to said bonds due on said last-mentioned date amounting to the sum of $34,800; that since the first day of January, 1889, and prior to the commencement of this suit seven hundred or more of said interest warrants or coupons due on that day, amounting to the sum of $21,000 or more, have been presented at the office or agency of the said The Kanawha and Ohio Railway Company in the city of New York, and payment thereof has been demanded and refused by said company and said company has in this respect made default and such default still continues, and the said The Kanawha and Ohio Railway Company has thus failed to pay interest on some of said bonds accruing to the stipulations of said bonds and the conditions and covenants of said mortgage or deed of trust and is in default in respect to said stipulations, conditions, and covenants.

And it was further averred that the said defendant railway company has a large floating debt amounting to about $350,000, and that the said railway company is insolvent and unable to pay its floating debt and current and presently accruing indebtedness for wages, taxes, &c.

250 It was further averred in said bill that each of the defendants, The Toledo and Ohio Central R'y Co. and The Shawnee and Muskingum River R'y Co., has or claims to have some interest in some part of the mortgaged property aforesaid, but that such interest was acquired subsequently to the making, execution, and delivery of the mortgage aforesaid and to the issue, sale, and delivery of the said bonds secured thereby and is subordinant, subject, and inferior to the lien of the mortgage aforesaid.

VII. It was therefore prayed in said bill that the said indenture of mortgage or deed of trust might be decreed to be a lien upon all the property, real, personal, or mixed, rights, franchises, lands, titles, railroads of the Kanawha and Ohio Railway Company described in said mortgage or deed of trust, and that the said Kanawha and Ohio Railway Company may be decreed to pay to complainant in said bill for the bondholders under aforesaid mortgage or deed of trust all arrears of interest now due or that may hereafter become due and payable on said bonds, together with all costs and expenses in this behalf incurred and expended, and in default thereof that the defendants above named and each of them and all persons claiming under them or either of them may be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to the said mortgaged premises and every part and parcel thereof, and that all and singular the said mortgaged premises, with the appurtenances, property, and effects, rights *rights*,

251 immunities, and franchises in the said mortgage mentioned, may be sold as an entirety under decree of this honorable court, and that at the same time and with said mortgaged property and franchises be sold the bonds and stock of the said Point Pleasant Bridge Company, now held by complainant (said trust company), and that out of the moneys arising from the sale thereof, after deducting from the proceeds of any such sale just allowance for all disbursements and expenses of the said sale, including attorney's and counsel fees and the reasonable charge of complainant for serv-

ices rendered as trustee and for all expenses incurred by it in the premises and all payments which may be made for taxes or assessments on the said premises or any part thereof, the said proceeds to be applied to the payment of such moneys due on the aforesaid bonds *and* company as may be at that time unpaid.

VIII. Your petitioner represents that he is the Erwin Davis referred to in said bill and that he is the owner in his own right of more than one hundred thousand dollars of the bonds secured by the said mortgage or trust deed referred to in said bill; and he further represents to your honors that he is the owner of five hundred thousand dollars, par value, of each class of stock of the said The Kanawha and Ohio Railway Company, viz., first, second, preferred, and common, so that your petitioner is deeply interested in the financial condition of said company and having all the assets of said company devoted justly and fairly to the payment of its debts.

Your petitioner further represents that it is admitted by said bill that there are certain mortgages, known as the Mineral Division mortgages of the Ohio Central Railroad Company, which are prior liens on a part of said railway, yet the said bill does not *does*
252 *not* make said last-mentioned railroad a party defendant to said bill, nor does it appear in said bill what part of said railroad is covered by said mortgages nor the amount thereof.

Petitioner further represents to your honors that it is admitted by said bill that the other defendants, other than the said The Kanawha and Ohio Railway Company, have or claim to have some interest in some part of the mortgaged property aforesaid, but avers that such interest was acquired subsequently to the making execution and delivery of the said mortgage and to the issue date and delivery of the bonds secured thereby; yet there is nothing in said bill defining such claim or interest, the extent thereof, or whether the same be in the railroad property itself or a money demand secured thereon.

Your petitioner further represents that it appears by said bill that the bonds sold and delivered and secured by said mortgage amount to the sum of $1,160,000, and that to secure the same the said trustee holds the bond- of the Point Pleasant Bridge Company to the amount of $1,000,000, secured by mortgage thereon, as also $998,000 of the stock of said bridge company, which said bonds and bridge stock are in addition to all the property of the said The Kanawha and Ohio Railway Company included in and covered by said mortgage.

Your petitioner represents that it nowhere appears in said bill that the said Point Pleasant Bridge Company is insolvent, nor that default has been made by said company in the payment of the interest on said bonds so held by said trustee, and therefore represents that said bonds and stock of said bridge company (the said Point Pleasant Bridge Company, as petitioner is informed
253 and be- and so charges, is a separate and independent corporation, incorporated under the laws of the State of West Virginia) should be first applied to the payment of the debt secured

by said mortgage before a sale of the railroad property itself; yet complainant in its said bill prays that the property be sold as an entirety, including said bonds and stock of said bridge company.

Your petitioner therefore represents to your honors that a sale of all of said railroad property as an entirety, as prayed for in said bill, should your honors decree a sale thereof before the lien of the mortgages known as the Mineral Division mortgages of the Ohio Central Railroad Company, which are prior liens, and before the extent of the interests of the other defendants in said bill named are ascertained, and especially a sale of the bonds and stock of said bridge company as an entirety with the said railroad property proper, would, as your petitioner believes, be destructive of his entire interest in said railroad as a stockholder, and that he would suffer great loss and damage thereby.

Your petitioner further represents to your honors that in said bill it is represented that the said The Kanawha and Ohio Railway Company has also a floating debt amounting to about $330,000.

Your petitioner further represents that since the filing of said bill *that* the said The Kanawha and Ohio Railway Company, on a suit instituted by the Kanawha Improvement Company in the circuit court of Kanawha county, State of West Virginia, it, the Kanawha and Ohio Railway Company, on the 7th day of August, A. D. 1889, without any declaration being filed to show on what said suit was formed, confessed a judgment in favor of said improvement company for the sum of $285,232.20.

254 Your petitioner further represents that as a bondholder and stockholder of the said The Kanawha and Ohio Railway Company, on behalf of himself and all other creditors and stockholders of the said railway company, he has filed his bill in the circuit court of the United States for the district of West Virginia against the said The Kanawha Improvement Company and the said The Kanawha and Ohio Railway Company, attacking said judgment so confessed as aforesaid upon the ground of fraud and praying that said judgment may be cancelled, set aside, and held for naught because of the illegality and fraud as set out and charged in said bill.

Your petitioner files herewith and as part of this his petition a certified copy of said bill so filed by him in said circuit court of the U. S. for the dist. of West Virginia, marked Exhibit "A," and which he prays to be read as part of this petition.

Your petitioner respectfully represents that he is advised that no decree of sale of the property included in said mortgage should be decreed until a reference is had to ascertain the liens — shall have been first ascertained thereon, the amounts thereof, and the order of their priorities; that a sale should not be decreed until the validity of the judgment referred to shall have been first adjudicated.

Petitioner therefore prays that this his petition be read and considered at the hearing; that your honors will not at said hearing enter a decree of foreclosure as prayed for in said bill until the matters of this petition have been fully heard and a proper refer-

255 ence to a master be made to ascertain all liens upon said

railroad and the order of their priorities, and that petitioner have full relief in the premises, and, as in duty bound, he will ever pray, &c.

ERWIN DAVIS, *By Counsel.*

J. B. JACKSON, *Sol.*

STATE AND COUNTY OF NEW YORK, *ss:*

Erwin Davis, the petitioner in the within petition named, being *fuly* sworn, on oath says that he has read the said petition and knows the contents thereof; that the matters therein contained so far as the same are stated on his own knowledge are true and so far as they are stated on information derived from others he believes them to be true.

ERWIN DAVIS.

Taken, sworn to, and subscribed before me this second day of December, 1889.

THEODORE KIENDL,
[SEAL.] *Notary Public, Kings County.*

Cert. filed in New York Co.

And afterwards, to wit, on the 5th day of December, A. D. 1889, the following exhibit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Exhibits Filed with Petition of Erwin Davis.

256 To the honorable judges of the circuit court of the United States for the district of West Virginia:

Erwin Davis, a citizen of and resident in the State of New York, brings this his bill against the Kanawha and Ohio Railway Company, a corporation created by and existing under the laws of the said States of Ohio and West Virginia and a citizen and resident in said States of Ohio and West Virginia, and having its principal office for said transaction of business in the State of Ohio, in the city of Columbus, in said State, and in the State of West Virginia, in the city of Charleston, in said State, and against the Kanawha Improvement Company, a corporation created by and existing under the laws of West Virginia and a citizen of and resident in the State of West Virginia, on behalf of himself and all other creditors and stockholders of the said The Kanawha and Ohio R'y Co., and thereupon your orator complains and says:

I. That on and prior to the first day of May, one thousand eight hundred and eighty-six, the Kanawha and Ohio R'y Co. aforesaid was and ever since has been a body politic and corporate of the name and style aforesaid, and as such corporation issued a great number of mortgage bonds, to secure which it mortgaged its railway, franchises, &c., and also issued a large amount of stock.

II. That your orator is the owner and holder of more than one hundred thousand dollars par value of the first-mortgage bonds of

said The Kanawha and Ohio Railway Company, and is also the holder and owner of more than five hundred thousand dollars par value of each class of stock of the said The Kanawha and Ohio Railway Company—first, second, preferred, and common—so that the plaintiff and others owning bonds and stock and holding claims
257 against said company, called the floating debt, which amounts to about three hundred and fifty thousand dollars, *is* deeply interested in having all the assets of the said company devoted justly and fairly to the payment of its debts.

III. That the said The Kanawha and Ohio Railway Co. is insolvent and all its assets, if properly applied, are insufficient for the payment of its debts in full.

That the Mercantile Trust Company, the trustee in the first mortgage of said defendant, The Kanawha and Ohio Railway Company, in February, 1889, brought its suit in the circuit court of the United States for the southern district of Ohio, eastern division, against the said railway company to foreclose said mortgage, and prayed, among other things, the appointment of a receiver for said railway Co., and that on the 19th day of February, 1889, in accordance with said prayer, the Honorable Howell E. Jackson, the judge of said circuit court, appointed Robert W. Kelley receiver of said company after the defendant had been served with process and had appeared to the application and, as the order shows, did not oppose the granting of the application.

The said receiver in said order appointing him, among other things, was "authorized and empowered to prosecute, defend, and continue any suits or actions now pending or which may hereafter be brought having for their subject-matter any right or liability of the defendants or in any way affecting its property." The receiver at once accepted the trust and entered upon the discharge of his duties; that on the 4th day of March, 1889, the same plaintiffs also filed an original bill in the circuit court of the U. S.
258 for the district of West Virginia against the same defendant praying the same relief as in the bill filed in the circuit court of the United States for the southern district of Ohio, in which said order appointing Robert W. Kelley said receiver was filed as an Exhibit "A." Duly certified copy of said order appointing said Kelley receiver is here filed and prayed to be taken and read as part of this bill, marked Exhibit "A."

IV. Your orator charges that under the decision of the Federal courts and according to right and justice no insolvent corporation can by confession of judgment or otherwise prefer a creditor; that such preference of a creditor will not be recognized by a court of equity, and that if such insolvent corporation by a deed of assignment or by a confession of judgment attempts to prefer one creditor to another that such assignment or confession of judgment will be set aside in a court of equity for fraud and illegality at the suit of another creditor or stockholder.

V. That no insolvent corporation being placed by a court of competent jurisdiction in the hands of a receiver with its corporate functions suspended, and by the order of such court of competent

jurisdiction it was ordered that the receiver should conduct all suits or actions brought and to be brought for said corporation and defend on behalf of said corporation all suits or actions brought or to be brought against said corporation, as was done by the said court in appointing a receiver for the defendant The Kanawha and Ohio Railway Company, as appears by said Exhibit "A," can appear itself or by its attorney-in-fact in any action and confess a judgment
259 preferring a creditor; that such action *such action* itself is a fraud upon the corporation, its creditors and stockholders.

VI. That the Kanawha Improvement Company is a corporation chartered under the laws of West Virginia; that it was incorporated in November, 1887, with a capital of only five thousand dollars; yet in August, 1889, it claimed that the defendant The Kanawha and Ohio Railway Company owed it over two hundred and eighty-five thousand dollars, and on the 19th day of July, 1889, it brought an action of debt in the circuit court of Kanawha county, West Virginia, against the Kanawha and Ohio Railway Company for $280,464.32; that said summons in debt was served on George S. Couch, att'y of record for said company, on the 27 day of July, 1889; that on the 7th day of August, 1889, and without any declaration filed to show on what the action of debt was founded, the said George S. Couch, claiming to act under a power of attorney, which pretended power of attorney is made a part of the record of said case, *and* then and there, as such pretended attorney-in-fact, pretended and attempted, for and on behalf of said insolvent corporation, whose corporated powers were then suspended and all its property and effects were then in the hands of Robert W. Kelley, receiver under the order aforesaid, to confess a judgment in favor of said Kanawha Improvement Co. for the sum of two hundred and eighty-five thousand two hundred and thirty-two dollars and twenty cents (285,232.20). A copy of the record of said judgment, together with the pretended power under which it was confessed, is herewith filed as part of this bill and marked Exhibit "B."

260 VII. The plaintiff charges that said confessed judgment is illegal, fraudulent, and void for the reasons before stated, because the corporation on whose behalf it was made was then and there insolvent and its functions suspended, and it was then and there, with all its property, &c., in the hands of a receiver and deprived of the right to do any act affecting its property, and because, further, the pretended authority to confess such judgment, which is made a part of the record of the judgment, is not a power of attorney and does not on its face show any authority to any one to confess such judgments.

VIII. The plaintiff charges that the said Kanawha and Ohio Railway Company did not, on the 7th day of August, 1889, owe any such sum of money to the said Kanawha Improvement Company as $285,232.20, and the said Kanawha Improvement Co. is here called upon to make discovery and say how much the said Kanawha and Ohio R'y Co. owed it on the 7th day of August, 1889, and in what the said debt consisted and the items of said debt, and if such sum — was due it at that time, under the circumstances and the

law, could have been confessed so as to bind the property of the said The Kanawha and Ohio Railway Company.

IX. That the said Kanawha Improvement Company has no assets, except stock in the Kanawha and Ohio Railway Company, and the pretended authority to confess said illegal and fraudulent judgment was brought about by fraud and collusion between the directory of the Kanawha Improvement Company and the directory of the Kanawha and Ohio Railway Company, some of which directors of the Kanawha Improvement Co. were also directors in the said Kanawha & Ohio R'y Co. for the purpose of de-
261 frauding the other creditors and stockholders of the said The Kanawha and Ohio Railway Company, and, in pursuance of said fraud and collusion, the said judgment was confessed as aforesaid for the purpose of binding, delaying, and defrauding the other creditors and stockholders of the said The Kanawha and Ohio R'y Co.; that the interests of the Kanawha Improvement Co. and the Kanawha and Ohio Railway Co. are practically the same, and both have appointed Geo. S. Couch their attorney of record, on whom service of process may be had, and a court of equity will not countenance an attempt to give authority to an insolvent corporation, with its corporate functions suspended and all of its property in the hands of a receiver and under the management of the court to confess judgment affecting its proper-y to another corporation closely allied to it in interest, and any such power and any confession of judgment made under such pretended power is fraudulent and void, and thereupon the said pretended power and the said pretended confession of judgment so set out as aforesaid are fraudulent and void.

X. The plaintiff charges that there was no legal meeting of the board of directors of the Kanawha and Ohio Railway Company held in the city of New York on the 29th day of July, 1889, as pretended in the so-called power of attorney filed with the record of said pretended judgment above filed as an exhibit and marked "B;" that there was no notice given to all of the directors of the said The Kanawha and Ohio Railway Company that said meeting would be held on the said 29th day of July, 1889; that there was not
262 a quorum present of the said board of directors at said meeting, and that a quorum of said directors did not vote for said resolutions. Your orator here filed interrogatories to the said The Kanawha and Ohio Railway Co., and ask- that it may be required to make full, explicit, and true answers under oath to each of said interrogatories.

1. What notice was given to the directors of the Kanawha and Ohio R'y Co. of the meeting pretended to be held in the company's office in New York on the 29th day of July, 1889? File the said notice or a copy thereof.

2. Who of the directors of said company were served with said notice, and how?

3. Who of said directors were present at said meeting?

4. Who of the said directors voted for said resolutions pretending to authorize said George C. Couch to confess a judgment in the cir-

cuit court of Kanawha county in favor of the Kanawha Improvement Company?

5. Who composed the whole board of directors of the Kanawha and Ohio Railway Company on the 29th of July, 1879? Give the name of each director.

6. What was done and entered on the record of the directors at said meeting? File with your answer a complete copy of the whole proceedings of the said board of directors on the said 29th day of July, 1889.

7. What were the bye-laws of the said The Kanawha and Ohio Railway Company in force on the said the 29th day of July, 1889? And file a copy of said bye-laws with your answer to this bill.

Your orator here propounds the following interrogatories to the defendant The Kanawha Improvement Company, and asks that it may be required to make full, explicit, and true answers thereto:

263 & 264 1. What was the consideration for the supposed debt of over $280,000, for which said pretended confession by payments was made in your favor against the Kanawha and Ohio Railway Company in the circuit court of Kanawha county, West Virginia, on the 7th day of August, 1879?

2. Of what items was said claim composed and how much was principal and how much was interest?

3. Was not your company chartered in November, 1887, with a capital of $5,000?

4. If so, how could your company have a claim in less than two years against the Kanawha and Ohio Railway Company for $285,000.00?

5. Within the last two years what has been the amount of the dealings in dollars between your company and the Kanawha and Ohio Railway Company?

6. Within the last two years how much cash has your company recovered from the Kanawha and Ohio Railway Company?

7. What was the evidence of said pretended indebtedness from the said The Kanawha and Ohio Railway Company to your company; was it in writing? If so, produce it—the writing.

8. Who were the directors of the Kanawha Improvement Company on the 29th day of July, 1889, the day on which the said The Kanawha and Ohio Railway Company pretended to confess said judgment to you for over $285,000?

9. At that time were any of the directors of your company also directors of the said The Kanawha and Ohio Railway Company? If so, who?

265 In consideration whereof, and forasmuch as your orator and those on whose behalf he sues are remidiless save in a court of equity, your orator prays that the said judgment so confessed or pretended to be confessed by Geo. S. Couch under a pretended power of attorney on behalf of the Kanawha and Ohio Railway Company in the circuit court of *the* Kanawha county, West Virginia, on the 7th day of August, 1889, in favor of the Kanawha Improvement — for the sum of two hundred and eighty-five thousand

two hundred and thirty-two $\frac{20}{100}$ dollars may be cancelled, set aside, and held for naught because of *the* illegality and fraud, and that your orator may have such further and general relief in the premises as the nature of the circumstances of their case may require and to equity shall seem meet; and may it please your honor to grant unto your orator a subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the Kanawha and Ohio Railway Company and to the Kanawha Improvement Company, therein and thereby commanding them and each of them, on a day certain therein to be named and under a certain penalty, to be and appear before this honorable court, then and there to answer all and singular the premises and the interrogatories aforesaid, and to stand to, perform, and abide by such order, direction, and decree as may be made against them in the premises — as may seem meet and agreeable to equity and good conscience; and, as in duty bound, your orator will ever pray, &c.

ERWIN DAVIS,
By COUNSEL.

266 J. L. B. JACKSON & OKEY JOHNSON,
Counsel for Complainant.

I, L. V. Demiker, clerk of the circuit court of the United States for the district of West Virginia, at Charleston, do certify that the foregoing is a true copy of a bill of complaint filed by Erwin Davis against the Kanawha and Ohio Railway Company and the Kanawha & Ohio Railway Company and the Kanawha Improvement Company in my said office on the 26th day of November, 1889, and on which process was duly issued as prayed for.

In testimony whereof I hereunto set my hand and the seal of said court this 26th day of November, 1889.

L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va. [SEAL.]

And afterwards, to wit, on the same day, there was filed in the clerk's office of said court the following motion, clothed in the words and figures following, to wit:

Motion to Strike from the Files the Petition of Erwin Davis.

267 (Copy motion when found.)

268 And afterwards, to wit, on the 5th day of December, A. D. 1889, the following petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Intervening Petition of West Virginia Print. Co.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Plaintiff,
vs.
THE KANAWHA AND OHIO RAILWAY Co., Defendant. } # 479.

To the honorable judge of said court:

The petition of the West Virginia Printing Company, a corporation duly created, organized, and doing business under the laws of the State of West Virginia, would respectfully show that the Kanawha and Ohio Railway Company is indebted to it, the said petitioner, in the sum of $236.86 for printing done for said railway Co. at its request between the 1st day of December, 1888, and the 19th day of February, 1889, as per statement of said work herewith filed and made part of this petition.

The said petition therefore prays that R. W. Kelley, receiver of said railway Co., may be directed to pay said account, with interest thereon from February 19, 1889, out of any funds on his hands or that may hereafter come into his hands from the operation of said railway, and that in case of sale of said property in the above suit that said claim and interest may be decreed to be paid out of the proceeds of such sale, and that all of the rights of the said pe-
269 titioner in the premises may be protected and enforced in this suit.

WEST VIRGINIA PRINTING CO.,
By D. C. GALLAHER, *Its Solicitor.*

UNITED STATES OF AMERICA, } *To wit:*
District of West Va., }

S. C. Butler, being duly sworn, says that he is the resident manager of said West Virginia Printing Co., and that the allegations in the foregoing petition contained are true, as he verily believes.

S. C. BUTLER.

Subscribed and sworn to before me, in my said district, this 3rd day of December, 1889.

PETER FONTAINE,
U. S. Commissioner for District of West Va.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Plaintiff,
vs.
THE KANAWHA AND OHIO RAILWAY Co., Defendant. } # 479.

Joint answer of the Kanawha and Ohio Railway Co. and R. W. Kelley, receiver of the Kanawha and Ohio Railway Co., to the petition of the West Virginia Printing Co. filed in the above-entitled cause.

These respondents, saving, &c., for answer to said petition, say that the claim set up by the said West Virginia Printing
270 *Printing* Co. in its said petition is just, true, and unpaid.

THE KANAWHA & OHIO R'Y CO. AND
R. W. KELLEY,
Receiver of the Kanawha R'y Co.

UNITED STATES OF AMERICA, } *To wit:*
District of West Va., }

R. W. Kelley, being duly sworn, says that he is now and has been since February 19, 1889, receiver of the Kanawha and Ohio Railway Co., and that for 11 months prior to said date he was the president and general manager of said company, and the foregoing answer is true, as he verily believes.

R. W. KELLEY.

Subscribed and sworn to before me, in my said district, this 3rd day of December, 1889.

PETER FONTAINE,
U. S. Com. for District of West Va.

Kanawha & Ohio railway.

CHARLESTON, KANAWHA Co., W. VA.,
AUDITOR'S OFFICE, 11, 22, '89.

D. C. Gallaher, Esq., attor'y.

DEAR SIR: Herewith pl's find statement of the West Va. P't'g Co.'s account with the Kan. — Ohio R'y Co. as per books in this office.

Y'rs truly,

L. D. KELLEY, *Auditor.*
M.

271 *Statement.*

CHARLESTON, W. Va., *Nov.* 11, 1889.

M Kanawha & Ohio R'y Co. in account with West Virginia Printing Co., printers and book-binders, Old Church, 252 Virginia street.

Terms, —.

Bal. as per statement and bills rendered ending Feb. 19, 1889		249 30
Less corrections		11 70
Bal.		$237 60
By error as claimed by K. & O. R'y Co.		75
Balance due		$236 85

Prompt settlement of the above account is expected if due, and, if not otherwise instructed, will draw for the amount ——.

272 West Virginia Printing Co. in account with Kanawha & Ohio R'y Co.

DR.		CR.		
		1888.		
		Dec. 31. By vou. 131	38 90	
		1889.		
		Jan'y 31. By vou. 76	68 15	
To balance	236 85	Feb. 19. By vou. 100	129 80	
				236 85
		By balance		236 85

Kanawha & Ohio R'y, Auditor's Office, Nov. 22, 1889, Charleston, W. Va.

273 And afterwards, to wit, on the 5th day of December, A. D. 1889, the following petition of J. C. Roy & Co. was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY.

To the honorable judges of said court:

The petition of the J. C. Roy & Co. would respectfully show that it is a corporation duly created, organized, and doing business under the laws of the State of West Virginia.

That the defendant company is justly indebted to your petitioner in the just and full sum of $1,457.75 for timber furnished by said

petition to the said company at its special instance and request and used by it in building and repairing trestles and other structures on and along its line of railroad.

That said sum is wholly unpaid, an account and statement of which is herewith filed and prayed to be read *on* part hereof; that said account has been audited by the auditor of R. W. Kelley, receiver of said defendant company, as appears from a statement made by said auditor, which is also herewith filed and prayed to be read as part hereof.

Your petitioner therefore prays that the said receiver may be directed to pay said sum of $1,457.75, with interest thereon
274 from the date of the last item on said account, to wit, January 24, 1889, out of any money in his hands or that may hereafter come into his hands, and that in the event of a sale of the property of the said defendant that said claim may be paid out of the proceeds of such sale unless otherwise provided for, and that all of the rights and equities of the said petition- in the premises may be fully preserved and enforced in this suit.

J. C. ROY & CO.,
By E. W. KNIGHT, *Sol.*

UNITED STATES OF AMERICA, *District of West Virginia,* } *To wit:*

Frank Woodman, being duly sworn, says that he is the president of the above petitioner, the J. C. Roy & Co.; that the allegations in said petition contained are true, as affiant verily believes.

FRANK WOODMAN.

Subscribed and sworn to before me this 3rd day of December, 1889, in my said district of West Virginia.

PETER FONTAINE,
U. S. Commissioner, District of West Va.

275 J. C. Roy & Co. in account with Kanawha and Ohio R'y Co.

Dr.		Cr.	
		1888.	
		Nov. —. By voucher 80.	705 40
		Dec. —. " " 156.	340 80
		1889.	
To balance.....	1,457 75	January. " " 96.	411 55
			1,457 75
		By balance.....	1,457 75

Kanawha & Ohio R'y, Auditor's Office,
Nov. 20, 1889, Charleston, West Va.

276 CHARLESTON, W. VA., —— —, 188–.

M. Kanawha & Ohio railroad bought of J. C. Roy & Company, manufacturers of and dealers in lumber, flooring, ceiling, weatherboarding, mouldings, scrolls, turning, extension, breakfast, and kitchen tables, beadsteads, stands, &c., &c.

Terms, —.
Saw and planing mills on Elk river, Clendennin St.

1888.

Sept.	25.	To 15 p's 2½ x 11, 30, 1,050 f.			26	25
	28.	" 5 " 2½ x 11, 30	350 f.			
		" 4 " 4½ x 8, 30	360			
		" 4 " 5 x 12, 30	600			
		" 3 " 3 x 6, 20	120			
				1,430 f.	35	75
		" 36 " 1½ x 3, 12, 180 f.			5	40
		" 300 f. 1½ poplar D. D			7	50
		" 340 " 1½ ash D. D			10	20
Oct.	4.	" 12 p's 6 x 8, 9, 384			5	76
		" 200 f. ½ D. D			5	00
		" 314 " 1¾ " "			7	85
	18.	" 6 p's 2¾ x 11, 30	468 f.			
		" 2 " 4½ x 9, 30	207 "			
				675 f.	16	85
	25.	" 2,000 f. 2 x 9 poplar, dry			34	
		" 2 p's 12 x 12, 10	200 f.			
		" 2 " 12 x 15, 6	180			
		" 2 " 3 x 8, 9	36			
		" 3 " 6 x 6, 12	108			
		" 1 " 7 x 8, 14	65			
				589 f.	8	84
		" 175 " 4 x 4, 4	928 f.			
		" 8 " 6 x 8, 9	288 "			
		" 24 " 3 x 4, 7	168			
		" 4 " 5 x 15, 8	200			
		" 20 " 4 x 8, 9	480			
		" 12 " 3 x 4, 6	72			
				2,136 f.	32	04
		" 38 " 2½ x 11, 8, 836 f.			12	50
		" 6 " 2¾ x 11, 30, 492 "			12	30
		" 2 " 10 x 12, 8, 160 "			2	40
277		" 1,000 " car roofing			25	00
		" 1,000 " pine car siding			30	00
		" 1,000 " T. & G. poplar			20	00
		" 3,100 " pine car flooring 1¾" thick			77	50
		" 500 " poplar car siding			12	50
		" 500 " ⅞ ash D. D			15	00
		" 50 " p's 1⅜ x 3, 14, 290 f.			8	70
		" 75 " brake-beam, @ 30c			22	50
		Over			433	84

278

1888.

Oct.	25.	To am't for'd			433	84
	26.	" 500 f., 2 x 4, board measure			7	00
	29.	" 2 set- pigeon-hole cases			2	50
	31.	" 8 p's 5 x 12, 30	1,200 f.			
		" 34 " 2¾ x 12, 30	2,788 "			
		" 12 " 4½ x 8, 30	1,080			
				5,068 f.	126	70
Nov.	1.	" 270 f. ⅞ D. D			6	75
		" 7 p's 5½ x 12, 16, 616 f.			9	24
	7.	" 1 " 7 x 9, 12	63			
		" 1 " 7 x 12, 12	84			
		" 1 " 9 x 9, 20	135			
		" 1 " 12 x 12, 10	120			
				402 f.	6	00

	8.	To 2 p's 6 x 8, 16, 128 f.				1 92
	14.	" 500 f. $\frac{7}{8}$ D. D.				12 50
		" 3,407 f. $1\frac{3}{4}$ D. D. T. & G. car flooring				85 00
	19.	" 284 ties, 8 x 10, 12, 22,720 f.				340 80
	20.	" 1 p's 7 x 9, 18	94			
		" 2 " 8 x 12, 18	288			
		" 1 " 7 x 8, 14	65			
		" 2 " 3 x $9\frac{3}{4}$, 20	100			
		" 40 f. $2\frac{1}{2}$ x 8	66			
		" 150 " 3 x 8	300			
				913 f.		13 70
Dec.	27.	" 612 " 2" x 3" oak				9 18
	28.	" 4 hours' turning, x				2 00
		" 500 f. $1\frac{1}{2}$" poplar D. D.				12 50
		" 452 " $1\frac{1}{2}$ " "				11 25
1889.						
Jan'y	12.	" 4 p's $4\frac{1}{2}$ x 11, 30	492 f.			
		" 4 " 5 x 9, 30	450 "			
		" 2 " 4 x 8, 30	160 "			
		" 2 " $4\frac{1}{2}$ x 8, 30	180 "			
		" 2 " 3 x $5\frac{1}{2}$, 30	78 "			
				1,350 f.	@ 25.00	34 00
		" 14 " 8 x 9, 9	756 f.			
		" 4 " 4 x 9, 9	96 "			
		" 12 " 4 x 11, 9	396 "			
		" 12 " 5 x 9, 9	405 "			
				1,653	@ 16.00	24 80
	16.	" 7 M shingles, No. 1				17 50
		Over				1,157 18

279

1889.						
Jan.	16.	To am't for'd				1,157 18
		" 250 f. pine flooring				7 00
	17.	" 26 p's 9 x 12, 8, 1,872 f. @ 15.90				28 08
		" 3 " 8 x 9, 12; 216 " "				3 24
	18.	" 1,000 f. car roofing				28 00
	24.	" 1,000 " yellow-pine car roofing				30 00
		" 1,736 " car flooring @ 25.00				43 40
		" 1 p. 1 x 5, 20, D. D. oak	8			
		" 4 " $\frac{3}{4}$ x 4, 8, " "	21			
		" 16 " $1\frac{3}{4}$ x 9, 9, " "	216			
		" 4 " 3 x 14, 9, " "	126			
		" 8 " 4 x 4, 8, " "	85			
		" 16 " 3 x 4, 8, " "	128			
		" 32 " 3 x 5, 10, " "	405			
		" 4 " 2 x 4, 9, " "	24			
		" 2 " $1\frac{3}{4}$ x 7, 20, " "	46			
		" 2 " 2 x 3, 14, " "	14			
		" 8 " 4 x 5, 8, " "	127			
				1,200	@ 20.00	24 00
		" 12 " 4 x 12, 8	384			
		" 12 " 7 x 12, 8	672			
		" 13 " 8 x 12, 8	832			
		" 12 " $3\frac{1}{2}$ x 14, 9	441			
		" 6 " $3\frac{1}{2}$ x $10\frac{1}{2}$, 9	174			
		" 2 " 3 x 12, 18	108			
				2,611 f.	@ 15.00	39 16
		" 2,000 f. 2" oak @ 14.00				28 00
		" 3,588 " 3" " @ 15.00				53 82
		" 1,000 " P. 1"				16 00
						1,457 88
Error, as claimed by the Co						13
Balance						1,457 75

280 And afterwards, to wit, on the 5th day of December, A. D. 1889, the following petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition of Frank Woodman.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST CO., Plaintiff,
vs.
THE KANAWHA AND OHIO RAILWAY CO., Defendant. } # 479.

To the honorable judge of said court:

The petition of Frank Woodman, proprietor of Kanawha woolen mills and machine shops, would respectfully show that the Kanawha and Ohio Railway Co. is partly indebted to him, its said petitioner, in the sum of $463.28 for engine and car repair for said company from October 27, 1888, to Feb. 18, 1889, as per statement of said work herewith filed and made part of this petition; that said account is past due and wholly unpaid, and has been audited by said railway Co., as appears from the statement of said company, also filed as part hereof.

The said petitioner therefore prays that R. W. Kelley, receiver of said railway company, may be directed to pay said account, with interest thereon from February 19, 1889, out of any funds in his hands or that may hereafter come into his hands from the operation of said railway, and that in case of sale of said property in the above suit that said claim and interest may be decreed to be paid out of the proceeds of such sale, and that all of the rights of
281 the *the* said petition in the possession may be protected and enforced in this suit.

FRANK WOODMAN,
Proprietor, &c.,
By GEO. W. KNIGHT, *Sol.*

UNITED STATES OF AMERICA, } *To wit:*
District of West Va., }

Frank Woodman, being duly sworn, says that the allegations in the foregoing petition contained are true, as he verily believes.

FRANK WOODMAN.

Subscribed and sworn to before me, in my said district, this 3rd day of December, 1889.

PETER FONTAINE,
U. S. Commissioner for District of West Va.

11, 23, '89.

L. D. K.:
Check this ac., & let me know if O. K.

R. W. R.

The Styrian Dance.

282 & 283 Frank Woodman in account with Kanawha and Ohio Railway Co.

Dr.		Cr.		
		1888.		
		Nov. 31. By voucher 60.	169 52	
		1889.		
		Jan'y 31. " " 74.	174 99	
		Feb'y 19. " 77.	43 12	
To balance	463 28	" 76.	75 65	
				463 28
		By balance		463 28

{ Kanawha & Ohio R'y Co., Auditor's Office, Nov. 23, 1889, Charleston, W. Va. }

284 CHARLESTON, W. VA., —— —, 188–.

To the Kanawha Woolen Mills and Machine Shops, Dr.

Frank Woodman, proprietor.

All-wool hosiery yarns, jeans, flannels, linseys, blankets. Wrought-iron fences, steamboat ratchets, log brands, mandrels, pulleys, shaftings, &c. Cylinders bored, valves planed. All kinds of iron & machine work.

M. Kanawha & Ohio R. R. for engine and car repairs.

'88.				
Octo. 27.	To bill rendered	61 47	61 47	Vou. 60.
Nov. 17.	" " " 108.33 — 28c.	108 05	108 65	
Dec. 31.	" " "	143 28	143 28	Vou. 74.
'89.				
Jan. 23.	" " "	31 71	31 71	
Feb. 2.	" " "	43 12	43 12	Vou. 77.
" 18.	" " "	75 65	75 65	Vou. 76.
			$463 88	
	Error		60	
			$463 28	

1888.			
Nov.	Vou. 60	169 52	
1889.			
Jan.	" 74	174 99	
Feb.	" 77	43 12	
"	" 76	75 65	
		463 28	

285 And afterwards, to wit, on the 5th day of December, A. D. 1889, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA & OHIO RAILWAY COMPANY. } # 479.

The joint answer of the Kanawha and Ohio Railway Co. and of R. W. Kelley, receiver of the Kanawha & Ohio Railway Co., to the petition of Frank Woodman filed in the above cause.

These respondents, saving, &c., answering, say that the claim set up by the said Woodman in his said petition is just, true, and unpaid.

THE KANAWHA AND OHIO RAILWAY CO.,
By R. W. KELLEY,
Receiver of the Kanawha and Ohio R'y Co.,
By KNIGHT & COUCH, *Solicitors.*

UNITED STATES OF AMERICA, *District of West Va.*, } *To wit:*

R. W. Kelley, being duly sworn, says that he is now and has been since Feb. 19, 1889, the receiver of the Kanawha and Ohio Railway Co., and that for 11 months prior to said date he was the president and general manager of said company, and the foregoing answer is true as he verily believes.

R. W. KELLEY.

286 Subscribed and sworn to before me in my said district this 3 day of December, 1889.

PETER FONTAINE,
U. S. Commissioner of Dist. of W. Va.

And afterwards, to wit, on the 5th day of December, A. D. 1889, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA & OHIO RAILWAY COMPANY. } # 479.

The joint answer of the Kanawha and Ohio Railway Co. and of R.W. Kelley, receiver of the Kanawha & Ohio Railway Co., to the petition of E. S. Bright filed in the above cause.

These respondents, saving, &c., for answer to the said petition say that the Kanawha and Ohio Railway Company is indebted to the said E. S. Bright upon the agreement filed with his said petition in the sum of $5,020 instead of $5,026.25 as claimed by said petitioner,

as will more fully appear from statement herewith filed and prayed to be read as part hereof made by the auditor of the receiver of said defendant company, and who was also the auditor of the said company before the appointment of a receiver.

THE KANAWHA & OHIO R'Y CO. AND
R. W. KELLEY,
Receiver of the Kanawha and Ohio R'y Co.,
By KNIGHT & COUCH, *Sol.*

UNITED STATES OF AMERICA, *District of West Va.*, } *To wit:*

R. W. Kelley, being duly sworn, says that he is now the receiver of the defendant The Kanawha and Ohio Railway Com-
287 pany and has been such since the 19th day of February, 1889; that for 11 months immediately preceding said date affiant was the president and general manager of said company. Affiant further state- that the facts and allegation- contained in the foregoing answer are true, as he verily believes.

R. W. KELLEY.

Subscribed and sworn to before me this 3rd day of December, 1889, in my said district.

PETER FONTAINE,
U. S. Com. for District of West Va.

288 And afterwards, to wit, on the 5th day of December, A. D. 1889, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA & OHIO RAILWAY COMPANY. } # 479.

The joint answer of the Kanawha and Ohio Railway Co. and of R. W. Kelley, receiver of the Kanawha & Ohio Railway Co., to the petition of Henry O'Blenness filed in the above cause.

These respondents, saving, &c., for answer to the said petition say the account and claim of the said Henry O'Blenness as set out in his said petition is just, true, and unpaid.

THE KANAWHA & OHIO R'Y CO.
R. W. KELLEY,
Receiver of the Kanawha & O. R'y Co.,
By KNIGHT & COUCH, *Sol's.*

UNITED STATES OF AMERICA, *District of West Va.*, } *To wit:*

R. W. Kelley, being first duly sworn, says that he is now and since February 19, 1889, has been the receiver of the defendant The

Kanawha and Ohio Railway Co., and that for 11 months prior to said date he was the president and general manager
289 *manager* of the said company, and that the allegations contained in the foregoing answer are true, as he verily believes.

R. W. KELLEY.

Subscribed and sworn to before me this 3rd day of December, 1889, in my said district of West Va.

PETER FONTAINE,
U. S. Commissioner for District of West Va.

290 And afterwards, to wit, on the 5th day of December, A. D. 1889, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA & OHIO RAILWAY COMPANY. } # 479.

The joint answer of the Kanawha and Ohio Railway Co. and of R. W. Kelley, receiver of said company, to the petition of J. C. Roy & Co. filed in the above cause.

These respondents, saving, &c., for answer to the said petition say that the Kanawha and Ohio Railway Company is justly indebted to the said petitioner in the sum of $1,457.75 as and for the items and bills as set out in the statement filed with said petition.

THE KANAWHA AND OHIO RAILWAY COMPANY,
R. W. KELLEY,
Receiver of the Kanawha and O. R. Co.,
By KNIGHT & COUCH, *Sol's.*

UNITED STATES OF AMERICA, } *To wit:*
District of West Virginia, }

R. W. Kelley, being by me first duly sworn, says that since the 19th day of February, 1889, he has been and still is the receiver of the Kanawha and Ohio Railway Company, and that for 11 months prior to said date he was the president and general manager of the said company; that the foregoing answer is true, as affiant verily believes.

R. W. KELLEY.

291 Subscribed and sworn to before me this 3rd day of December, 1889, in my said district.

PETER FONTAINE,
U. S. Com. for District of West Va.

And afterwards, to wit, on the 5th day of December, A. D. 1889, the following consent of the Toledo & O. C. R'y to entry, &c., was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

U. S. Circuit Court, S. D. O., Eastern Division.

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA AND OHIO RAILWAY CO. and Others.

The Toledo and Ohio Central Railway Company hereby waives the right to plead herein and consents to the entry of the decree herein according to the prayer of the amended bill of complaint, and in general consents that this cause proceed in like manner as if an order *pro confesso* had been duly entered against it more than thirty days prior to the date hereof.

Dated Nov. 29, 1889.

A. W. SCOTT,
Sol. for T. & O. C. R'y Co.

And afterwards, to wit, on the 5th day of December, A. D. 1889, an order was made upon the order book of said court clothed in the words and figures following, to wit:

O. B. B., p. 615.

Upon application of the Adams Express Company leave is given to it to file an intervening petition, setting up a lien alleged to be held by it upon the property in question herein or upon a part thereof prior to the lien of the plaintiff by virtue of re-
292 ceiver's certificates issued by Thomas R. Sharpe, receiver, to the amount of about $35,000 under the orders of the district court of the United States for the district of West Virginia, sitting as a circuit court, in the proceedings under which said property was formerly sold by said court. The parties hereto consent to said application and to the adjudication of said alleged lien in this suit, it being agreed that the sale under the decree herein shall be free from said alleged lien, and that the same, if adjudicated in favor of said Adams Express Company, shall be transferred to the proceeds of sale and paid out of the same.

And afterwards, to wit, on the 5th day of December, A. D. 1889, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 623.

This cause coming on this day to be heard upon the amended bill of complaint, taken as confessed against all the defendants herein, it is, on motion of the solicitors for the complainant—

Ordered that it be, and is hereby, referred, on suggestion of counsel, to B. R. Cowen, who is hereby appointed special master for the purpose, to inquire and report:

(1.) What amount of bonds of the Kanawha and Ohio Railway Company secured by the mortgage mentioned in said amended bill of complaint are now outstanding.

(2.) What amount of the interest upon said bonds due January 1st, 1889, is unpaid, and what amount of interest upon said bonds due July 1st, 1889, is unpaid, and what amount of inter- is
293 unpaid, and what amount of interest upon said bonds will become due on January 1st, 1890.

And afterwards, to wit, on the 5th day of December, A. D. 1889, the following oath was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Oath of Special Master B. R. Cowen.

U. S. Circuit Court, S. D. O.

THE MERCANTILE TRUST CO., Trustee,
vs.
THE K. & O. R'Y CO. *et al.*

I, B. R. Cowen, having heretofore been appointed special master in the above-entitled cause, do solemnly swear that I will faithfully and impartially perform my duties as such master, agreeable to the order of the court, to the best of my ability and understanding, so help me God.

B. R. COWEN.

Sworn to before me and signed in my presence this 5th day of Dec., A. D. 1889.

B. E. DILLEY,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

And afterwards, to wit, on the same day, there was filed in the clerk's office of said court the following report of special master. Said report is in the words and figures following, to wit:

Report of Special Master B. R. Cowen.

294 Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee,
against
THE KANAWHA AND OHIO RAILWAY COMPANY and Others.

This day comes B. R. Cowen, appointed special master herein by order this day entered, to inquire and report what amount of bonds of the Kanawha and Ohio Railway Company secured by the mortgage mentioned in the amended bill of complaint herein are now outstanding, and what amount of interest upon said bonds due January 1st, 1889, is unpaid, and what amount of interest due July 1st, 1889, is unpaid, and what amount of interest upon said bonds will become

due on January 1st, 1890, and said master reports to the court as follows:

That he has been attended by counsel for the complainant herein and by R. T. H. Halday, a director of defendant company, a witness produced in behalf of the complainant, and that he has taken the testimony offered, and finds and reports that eleven hundred and sixty of the bonds of the Kanawha and Ohio Railway Co. secured by the mortgage mentioned in the amended bill of complaint herein, being for the principal sum in the aggregate of eleven hundred and sixty thousand dollars, are now outstanding; that of the interest upon said bonds due January 1st, 1889, the sum of twenty-five thousand six hundred and eighty dollars is un-
295 paid; that of the interest upon said bonds due July 1st, 1889, the sum of thirty-four thousand eight hundred dollars is unpaid, and that the sum of thirty-four thousand eight hundred dollars will become due as the interest upon said bonds on January 1st, 1890.

All of which is respectfully submitted.

B. R. COWEN,
Special Master.

Cincinnati, Dec. 5, 1889.

And afterwards, to wit, on the 5th day of December, A. D. 1889, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 615.

This cause coming on this day to be heard upon the original and amended bill of complaint filed herein and upon the orders for decree *pro confesso* hereinbefore entered against the defendants The Kanawha and Ohio Railway Company and The Shawnee & Muskingum River Railway Company, said orders having been entered for more than thirty days, and upon the consent of the defendant The Toledo & Ohio Central Railway Company filed herein, to the effect that decree be entered herein according to the prayer of said amended bill, and that this cause proceed as if order for decree *pro confesso* had been entered against said last-named defendant more than thirty days prior to November 29, 1889, and upon the report of B. R. Cowen, Esq., special master, this day filed, and all the proceedings herein, and said cause having been argued by counsel, the court, being fully advised in the premises, upon consideration finds, orders, adjudges, and decrees as follows, to wit:

The court finds that the Kanawha and Ohio Railway Co. is, and on and prior to the first day of May, in the year one
296 thousand eight hundred and eighty-six, was, a body politic and corporate of that name and style, with all the powers, rights, privileges, franchises, and immunities granted by the laws of the State of Ohio and the laws of the State of West Virginia to corporations formed under the laws of said respective States for the construction, operation, and maintenance of railroads in said States, and was the owner of and in possession of the railroad and property

and held the rights and franchises mentioned in the mortgage or deed of trust hereinafter mentioned, and that the plaintiff, The Mercantile Trust Co., during the same time was and still is a corporation duly organized and existing under the laws of the Sta-e of New York and having power under said laws to accept and execute such trusts as were created by the mortgage or deed of trust hereinafter mentioned.

The court finds that on or about May first, in the year one thousand eight hundred and eighty-six, the defendant The Kanawha and Ohio Railway Company duly made and executed its certain bonds, dated on that day, each for the payment to bearer, or, in case of registry, to the registered owner of one thousand dollars in gold coin of the United States of the then present standard of weight and fineness, at the office or agency of said company, in the city of New York, on the first day of January, in the year one thousand nine hundred and thirty-six, and for the payment on presentation and surrender of the coupons or interest warrants annexed to said bonds as they should severally become due of interest thereon at the rate of six per cent. per annum from July 1st, 1880, until such principal should be paid, such interest being payable in like coin at said office or agency on the first days of January and July in each year, and that in order to secure the payment of the principal and in-

297 terest of said bonds the said railway company *company*, on or about said first day of May, 1886, duly made, executed, and delivered to the complainant its certain mortgage or deed of trust, a copy of which is on file attached to the original bill in this cause, marked "Exhibit A," dated on that day, whereby it conveyed to the complainant and its successors and assigns all the property and rights described as follows, to wit:

All and singular the railroad of the said The Kanawha and Ohio Railway Co. extending from a point in the village of Corning, in the township of Monroe, in the county of Perry, in the State of Ohio, through the counties of Perry and Athens by way of Jacksonville to a point within or near South Shawnee, in said county of Perry, and through or into the counties of Perry, Athens, Meigs, and Gallia by way of Athens and Middleport to a point on the Ohio river opposite the village of Point Pleasant, in the State of West Virginia, and thence across the Ohio river and through the counties of Mason, Putnam, Kanawha, and Fayette by way of Charleston, and in general along or near the northeasterly bank of the Kanawha river to a point at or near the mouth of Gauley river, in said county of Fayette, in said State of West Virginia, constructed or to be constructed, and as the same then was or might thereafter be located and whether then acquired or to be thereafter acquired, including all and singular the

298 railroad, lands, and other property which were conveyed to the Ohio and Kanawha Railway Company by Erwin Davis and Emily B., his wife, Albert Gallup & Edward C. Homans & Francis E., his wife, by deed dated the 29th day of January, in the year one thousand eight hundred and eighty-six, and including also all and singular the railroad, land, and other property (except the

coal lands and mineral rights in Raleigh county) which were conveyed to the Kanawha and Ohio Railway Co., a corporation of the State of West Virginia, by the said Edward Davis and Emily B., his wife, Albert Gallup and Edward C. Homans and Francis E., hiw wife, by deed dated the 29th day of January, one thousand eight hundred and eighty-six.

And also all and singular the lands, tenements, and hereditaments, rights of way and easements, and all other interests in land, including lands held or acquired for the purposes of depots, stations, terminals, or ferries then held or thereafter acquired by said railway company in connection with said railroad or for the uses thereof.

And also all letters patent, grants of land, and of land under water and of water rights, and all leaseholds, leases, terms and parts of terms, rights under leases or contracts, covenants or agreements, and all rights of trackage, terminal bridge and ferry rights, privileges and franchises, and all licenses, permits, and privileges from the Government of the United States or from the State of Ohio or the State of West Virginia or by any governmental or municipal authority, and all other rights or privileges, general or special, then held or thereafter acquired by said railway company for the purposes of said railroad or any part thereof.

And also all railway tracks, sidings, spurs, turnouts, bridges, station-houses, depots, freight-houses, warehouses, elevators,
299 round-houses, car-houses, storehouses, turn-tables, water *water* tanks, machine shops, and repair shops, and other structures, buildings, erections, and fixtures of every kind and nature whatsoever then held or which might thereafter be acquired by the said railway company for the uses and purposes of the said railway or in connection therewith or in the business thereof.

And also all locomotives, engines, cars, and other rolling stock and railway equipment, and all ferry-boats, steamboats, tug-boats, floats, barges, and other floating equipment, and all tools, rails, ties, machinery, implements, fuel, and materials then held or which might thereafter be acquired for the uses or purposes of the said railway or in connection therewith or the business thereof.

And also all other property, real, personal, or mixed, then held or which might thereafter be acquired for the purposes of the said railway or for the use thereof or in connection with the construction, operation, or maintenance, reparation, or replacement of the said railway or any part thereof or as convenient or necessary for the uses or purposes thereof.

And also all rights, powers, privileges, and franchises connected with or relating to the said railway and other property, including the right to operate and maintain the said railway and other property whether then held or thereafter acquired by the said railway and connected with or relating to the said railway or for the uses or purposes thereof.

And also all improvements made or to be made to any or all of said railway, property, or estate by the said railway Co. or by others, and also all and every other estate, right, title, interest,

property, or thing, right, privilege, or franchise which the said railway Co. then owned or held or which it might thereafter acquire or hold as necessary or convenient for the use, occupa-
300 tion, and enjoyment of said railway rights, privileges, and franchises or any part or portion thereof.

And also all estate, right, title, and interest which the said railway company then had or might thereafter acquire of, in, or to the railway bridge across the Ohio river at Point Pleasant, in the State of West Virginia, and the railway and other property appurtenant thereto, and that the complainant accepted the trust created by said mortgage.

The court further finds that said mortgage or deed of trust was made subject as to part of said railroad to the lien of certain mortgages known as the Mineral Division mortgage of the Ohio Central Railroad Company, therein described.

The court further finds that also, in order to secure the payment of the principal and interest of said bonds, the said Kanawha and Ohio Railway Co., in compliance with its covenant or promise to that effect in said mortgage or deed of trust expressed, on or about July 2nd, 1886, caused to be delivered to the complainant bonds of the Point Pleasant Bridge Company for the principal sum in the aggregate of one million dollars, secured by mortgage of said bridge Co. to John W. Simpson, as trustee, and *and* stock of said bridge Co. of the par value of nine hundred and ninety-eight thousand dollars, to be held in accordance with said covenant, and to be held and dealt with in accordance with a certain written agreement of that date, a true copy of which is filed with the original bill in this cause and marked "Exhibit B," and that said bonds and stock are still held by the complainant for such purpose.

The court further finds that the issue of said bonds and the execution and delivery of said mortgage by the Kanawha and Ohio Railway Company were duly authorized and assented to by
301 all its *its* stockholders and by its board of directors, and finds and adjudges that, by virtue of said mortgage or deed of trust and of the said agreement "Exhibit B," the holders of all said bonds now outstanding and the interest warrants or coupons thereto attached have a lien for the payment thereof upon all the property, rights, privileges, and franchises in said mortgage or deed of trust described, whenever acquired, and also upon the said bonds and the said stock of the Point Pleasant Bridge Company.

The court further finds that of the said bonds of the Kanawha and Ohio Railway Co. there have been duly issued for value and in accordance with the conditions of said mortgage or deed of trust, and are now outstanding in the hands of *bona fide* holders, eleven hundred and sixty bonds for the principal sum in the aggregate of eleven hundred and sixty thousand dollars.

The court further finds that on the first day of January, 1889, there became due and payable upon the said bonds a semi-annual instalment of interest, evidenced by the interest warrants or coupons thereto attached, due and payable on said last-mentioned date, amounting to the sum of thirty-four thousand eight hundred dollars;

that of the said sum only nine thousand one hundred and twenty dollars, being the interrest on three hundred and four of said bonds, have been paid, and that the said railway company has failed to pay the remainder of said interest, falling due on January 1, 1889, to wit, the sum of twenty-five thousand six hundred and eighty dollars, and in that respect has made default, and that such default still continues.

The court further finds that since the said first day of January, 1889, and before the filing of the original bill herein *herein*,
302 seven hundred and thirty of said interest warrants, falling due on January 1st, 1889, were duly presented at the office or agency of said railway company in the city of New York and payment thereof was demanded and refused by said company.

And the court further finds and adjudges that said railway company was, before the filing of the original bill herein, in default in respect to the stipulations of said bonds and the covenants and conditions of said mortgage or deed of trust, and that such default continues.

The court further finds that on the first day of July, 1889, there became due and payable on said bonds a semi-annual instalment of interest, amounting to $34,800, and that no part thereof has been paid, and that in this respect said railway Co. has made default, and that such default continues; and, further, that according to the provisions of said bonds and of said mortgage or deed of trust another instalment of interest on said bonds, amounting to $34,800, will become due and payable on the 1st day of January, 1890.

And the court further finds that the railway bridge at Point Pleasant and its approaches which are represented by the aforesaid bonds and stock of said bridge Co. are used as a part of the line of road of the said defendant, The Kanawha and Ohio Railway Co., connecting its railroad in Ohio with its railroad in West Virginia.

The court further finds and adjudges that each of the defendants The Toledo & Ohio Central Railway Company and The Shawnee & Muskingum River Railway Company has an interest in a part of the mortgaged property aforesaid, but that such interest was
303 acquired subsequently to the making, executing, and delivery of the mortgage or deed of trust to the complainant herein aforesaid and to the issue, sale, and delivery of the said bonds secured thereby, and is subordinate, subject, and inferior to the lien of the mortgage or deed of trust to the complainant aforesaid.

And it is hereby ordered, adjudged, and decreed that within thirty days from this date the defendant The Kanawha and Ohio Railway Company or one or more of the defendants or some person or persons for it or them pay to the complainant herein, for the benefit of the parties entitled thereto, the amount of interest upon said bonds now due and unpaid, with interest at the rate of six per cent. per annum thereon, to wit, the sum of $25,680, with interest thereon from the first day of January, 1889, and the sum of thirty-four thousand eight hundred dollars, with interest thereon from the first day of July, 1889, and, unless said payment shall be made before the first day of January, 1890, the further sum of

thirty-four thousand eight hundred dollars, with interest from the said first day of January, 1890; and also a sum of money sufficient to defray the costs of this suit, including allowances to counsel to be taxed and fixed, and in default thereof that the lien existing by virtue of said mortgage or deed of trust and of said agreement "Exhibit B" be foreclosed, and that all the property, rights, and franchises hereinbefore described and every part and parcel thereof and all the said bonds and the said stock of the Point Pleasant Bridge Co. hereinbefore mentioned be sold together as an entirety by or under the direction of Pelatiah W. Huntington, Esq., who is hereby appointed commissioner for that purpose, at public auction,
at the front door of the court-house of the United States court
304 in the city of Columbus, in the southern district of Ohio,
eastern division, on a date to be fixed by the said commissioner, with power to the said commissioner to adjourn the sale once or from time to time without further notice except an announcement of the postponement in each instance made by the commissioner or his representative at the time and place previously fixed for such sale.

Public notice of the time and place of such sale shall be given by publication, beginning not less than forty-five days prior to the time of the said sale, and to be repeated weekly until the sale in three newspapers of general circulation, one published in the city of Charleston, in the State of West Virginia, an- one published in the city of Columbus, in the State of Ohio, and one published in the city of New York, in the State of New York, and such notice shall describe the property to be sold in general terms, and shall refer to the decree for a more particular description.

The entire property to be sold as aforesaid, subject to said Mineral Division mortgages, shall not be sold for a less sum than five hundred thousand dollars without the further order of this court; and, in case no bid of that amount or more shall be made when the same shall be offered for sale, the said commissioner shall adjourn the sale and forthwith make report to this court and receive its further instructions.

No bid shall be accepted by the commissioner at such sale unless the bodder shall deposit with him in money or by certified check on some responsible bank the sum of fifty thousand dollars in money. After the sale shall have been made by the commissioner,
in pursuance of this decree, he shall report the same to this
305 court for confirmation and shall pay over any money received
into the registry of this court. If any bid shall be accepted by the court and the person or persons making the same shall fail to comply with all the conditions of the sale and all orders which may be made in respect thereto, tehen the sum so deposited by him shal- be fo-feited and shall be applied to the payment of the expenses of resale or to the costs of this cause or to the payment of the bonds aforesaid, as the court shall order; but, in case such bid shall be rejected by the court, the deposit made by the bidder shal- be returned to him.

It is further ordered that such further portions of such purchase

price shall be paid in money as this court shall from time to time direct, in order to meet claims which this court may adjudge in this cause to be prior in equity to the said first mortgage of the Kanawha and Ohio Railway Company mentioned in the amended bill of complaint, and the court reserves the right to resell the said mortgaged premises, pr-perty, rights, and franchises upon the failure upon the part of the said purchaser or purchasers to comply within twenty days with any order of this court in that regard, and that the balance of said purchase price shaol be paid in money or in first-mortgage bonds of the Kanawha & Ohio Railway Company and the unpaid bonds of the Kanawha & Ohio Railwau Company and the unpaid and overdue coupons, and that such bonds and coupons be taken at such price or value as the holders thereof would have been entitled to receive on a distribution of the proceeds of sale in case the entire amount of the bid had been paid in money.

306 It is further ordered, adjudged, and decreed that such sale shall be without redemption, and when made and confirmed by the court and all the conditions thereof fully complied with shall forever bar and foreclose all right, title, and equity of redemption of the defendants and of each of them and of all parties claiming by, through, or under them or either of them in or to the mortgaged premises, property, rights, and franchises mentioned in said amended bill of complaint hereinbefore described and every part and parcel thereof, and also all right, title, and equity of redemption of said parties defendant and each of them and of all persons claiming by, through, or under them or either of them on or to the stock and bonds of the Point Pleasant Bridge Co. mentioned in said amended bill of complaint.

It is further ordered, adjudged, and decreed that when the sale — be made hereunder shall have been confirmed by the court and all the conditions of the sale and all the orders of the court in respect thereto shall have been fully complied with the commissioner making the same shall execute and deliver to said purchaser or purchasers a deed of conveyance of all the property, rights, and franchises, including said bonds and stock of the Point Pleasant Bridge Co., sold by him under this decree, and the complainant herein and the defendant The Kanawha and Ohio Railway Co. shall also execute and deliver to the said purchaser or purchasers a proper deed or deeds of conveyance conveying and transferring to the said purchaser or purchasers all the estate, right, title, and interest of each of them of, in, or to the property, rights, and franchises herein directed to be sold, including said bonds and stock of said Point Pleasant Bridge Company, and the complainant shall deliver to said purchaser or purchasers all said bonds and

307 stock of said Point Pleasant Bridge Co., and the complainant shall deliver to said purchaser or purchasers all said bonds and stock of said bridge company.

It is further ordered, adjudged, a-d decreed that all questions touching the proceeds of the said sale and the distribution thereof ot disposed of by this decree are reserved by the court, and that any party to this action or the commissioner may apply to the court

for such other or further direction as may be necessary to carry this decree into effect.

Thereupon came the intervening petitioner, Erwin Davis, and prayed the court for the allowance of an appeal, with supersedeas, from the foregoing decree, and the court thereupon refused the appeal.

And afterwards, to wit, on the 8th day of January, A. D. 1890, the following petition was filed in the clerk's office, with exhibit attached. Said petition and exhibit *is* clothed in the words and figures following, to wit:

Petition of Trimble Mill Co. and Exhibit "A."

The United States Circuit Court, Eastern Division, Southern District of Ohio.

In the Matter of THE MERCANTILE TRUST CO. *against* THE KANAWHA AND OHIO RAILROAD COMPANY. } No. 479.

To the Honorable George R. Sage, judge:

Your petitioner, The Trimble Mill Company, a corporation under the laws of Ohio, represents that the said The Kanawha and Ohio Railroad Co. is indebted to your petitioner in the sum of one thousand ninety-eight & $\frac{50}{100}$ dollars, with common interest thereon
308 since the 24th day of January, 1889; that said sum is now due and payable, and to secure the payment of the same your petitioner avers that it did, on the 26th day of February, 1889, in the manner and form prescribed by the laws of Ohio, take out and perfect a mechanics' lien on certain real estate there belonging to the said Kanawha and Ohio Railroad Company described as follows:

The depot building and ground whereon the same is situate at Jacksonville, Athens county, Ohio.

That on the 27th day of February, 1889, at 5.20 p.m., said lien was entered for record with the recorder of said Athens county, and the same was, on the 2nd day of March, 1889, duly recorded in Mechanics' Lien Book No. 1, at page 351, of said county's records.

Your petitioner therefore insists that it has a substantial lien on said premises by virtue of said mechanics' lien, a true copy of which is hereto attached and made a part of this pleading, marked "Exhibit A," and it prays your honors that it may be heard upon this petition, and that its rights, whatsoever your honors may determine them to be, may be enforced and all proper relief granted.

FRANK W. MERRICK,
Att'y for Petitioner.

STATE OF OHIO, *Athens County,* } ss:

F. M. Koons, being first duly sworn, deposes and says that he is secretary of the above-named Ohio corporation, the Trimble Mill

Company, and that the facts stated in the foregoing pleading are true, as he believes.

F. M. KOONS.

Subscribed in my presence and sworn to before me this 3rd day of January, A. D. 1890.

J. C. HEADLEY, *N. P.* [SEAL.]

309 EXHIBIT "A."

Mechanics' Lien.

THE TRIMBLE MILL COMPANY
against
THE KANAWHA AND OHIO R'Y CO.

THE STATE OF OHIO, *Athens County,* } ss:

F. M. Koons makes oath and says that he — secretary of the Trimble Mill Company, and the following is a correct account of the amount and value of the labor performed for and the materials furnished to the Kanawha and Ohio Railway Co. and the dates and times when said labor and materials were done and furnished, upon which there are no credits or offsets:

1888, Nov. 23rd.	To material.....	$225 95
1889, Jan. 15.	To balance on material and labor.....	787 55
		$1,013 50

The work and property named in the above account were used and applied to the construction of a depot building at Jacksonville, Ohio, on the right of way of said railway company, and that said materials was furnished and labor performed under a contract made by letters, of which the following are copies:

TRIMBLE, O., *Oct.* 15, 1888.

Chas. K. McDermott, Esq., Charleston, W. Va.

DEAR SIR: We will furnish material and construct depot at Jacksonville, O., according to plans furnished for same and specifications and contract for Glouster depot, the same to be completed within 90 days and if possible by Jan. 1, 1889, for the sum of $1,013.50.

F. M. KOONS, *Sec.*

310 TRIMBLE, O., *Oct.* 15, 1888.

Trimble Mill Company, Trimble, Ohio.

GENTLEMEN: Your proposition of this date to furnish all the materials and labor for the depot to be constructed at Jacksonville, Ohio, and to construct same in accordance with the plans of same and specifications governing the construction of the Glouster

depot for the sum of $1,013.50, one thousand and thirteen $\frac{50}{100}$ dollars, and binding yourselves to complete the same within three months from this date or sooner of possible, is hereby accepted. Payment for the work will be made on the 15th of each month for all work in place up to the 1st of the month, renewing 10 per centum of the cost thereof.

Yours truly, CHAS. K. McDERMOTT,
Resident Engineer K. & O. R'y.

Said company therefore claims the statutory mechanics' lien on said structure from the date of the first item of said account.

Sworn to and subscribed before me this 26th day of February, 1889.

[SEAL.] J. C. HEADLEY,
Notary Public.

Entered February 27, 1889, at 5.20 p. m.
Recorded March 2, 1889.
Attest: C. L. BEAN, *Recorder*,
By WM. L. BROWN, *Deputy.*

311 ATHENS, OHIO, *July* 25, 1889.

I hereby certify this to be a true copy of the mechanics' lien of the Trimble Mill Company (against) the Kanawha and Ohio Railway Company, as recorded in vol. 1, at page 351, of Records of Liens of said Athens county, Ohio.

C. L. BEAN, *Recorder.*

And afterwards, to wit, on the 11th day of January, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 215.

A decree of sale having been made by this court in this cause on the 5th day of December, 1889, whereby it was, among other things, ordered that certain property, rights, and franchises therein described should be sold as therein directed unless certain payments should be made within thirty days thereafter, and said thirty days having elasped and no such payments having been made, as appears to the satisfaction of the court—

It is ordered that the commissioner in said decree named do proceed to make the sale as therein directed and in all respects to do as therein he was directed in such case to do.

And afterwards, to wit, on the 22nd day of January, A. D. 1890, the following petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition of the Argand Refining Co.

312 In the Circuit Court of the United States, Sixth Circuit, Southern District of Ohio, Eastern Division.

Intervening Petition of the Argand Refining Co.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA AND OHIO RAILWAY CO. and Others.

To the honorable judges of said court:

Your petitioner, The Argand Refining Company, respectfully represents that it is a corporation duly *re*ganized and existing under and by virtue of the laws of the State of Ohio; that in October, Nov., and Dece-, A. D. 1888, and in January, A. D. 1889, your petitioner furnished supplies to the said The Kanawha and Ohio Railway Company, to wit, certain barrels of oil, a true and detailed account of which, duly verified, is hereto attached, marked Exhibit "A," and is made a part hereof; that said oil was used by said The Kanawha and Ohio Railway Company in the running of its trains and the operation of its line of railroad; but, owing to the appointment of the receiver herein, said company has not paid for the same, and is now indebted to your petitioner therefor in the sum of $299.61, with interest from January 17, 1889; that both said company and the receiver appointed herein admit the correctness of said account and the justness of your petitioner's claim therefor.

Wherefore your petitioner, The Argand Refining Co., respectfully prays that an order may be entered herein ordering Robert W. Kelley, receiver appointed herein, to pay your petitioner out of the funds in his hands as such receiver the said sum of $299.61,
313 with interest from January 17, 1889, and for such other relief as your petitioner is entitled to.

THE ARGAND REFINING CO.,
Intervening Petitioner.

A. D. FOLLETT, *Solicitor.*

314 T. D. Dale, president. W. J. Cram, manager. O. D. Cram, man.

Monthly Statement.

Folio 224. MARIETTA, O., *Jan.* 1, 1890.

Kanawha & Ohio Railroad Company, Charleston, W. Va.,

R. W. Kelly, receiver,

To the Argand Refining Co., producers of petroleum & manufacturers of carbon, engine & lubricating oils, Dr.

Office, 1st National Bank building.

Branch offices, Kansas City, Mo., St. Louis, Mo.

Specialties: Cylinder oil, car-axle and mill greases.

1888.				
Oct. 30.	To mdse		65 87	
	5 bbls. H. L., 268 galls. @ 10½	28 14		
	10 " zero lub., 539 galls. @ 7c	37 73		
1888.				
Nov. 30.	To mdse		97 51	
	10 bbls. zero, 529, @ 7½c	39 68		
	5 " loco. eng., 268, @ 11c	29 48		
	5 " 175° H. L., 270, @ 10½c	28 35		
1888.				
Dec. 21.	To mdse		108 61	
	20 bbls. zero, 1,055, @ 7½c	79 13		
	5 " eng. oil, 268, @ 11c	29 48		
1889.				
Jan. 17.	To mdse		27 62	
	5 bbls. 175° H. L., 263, @ 10½c	27 62		
				$299 61

THE STATE OF OHIO, *Washington County,* } *ss:*

T. D. Dale, being duly sworn, says that he is the president of the within-named "The Argand Refining Company," and that the within account is just and true, and that there is justly due thereon to said company the sum of $299.61, with interest thereon from January 17th, 1889, and that there are no set-offs to the same.

T. D. DALE.

Subscribed in my presence and sworn to before me this 20th day of January, 1890.

R. L. NYE,
Notary Public.

[NOTARIAL SEAL.]

315 And afterwards, to wit, on the 27th day of January, A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, p. 217.

This day came the Lake Shore & Michigan Southern Railway Company, by its solicitor, E. D. Potter, Jr., and this matter came on for hearing at chambers before Hon. Howell E. Jackson, circuit judge of said court, upon the application of said The Lake Shore & Michigan Southern Railway Company for an order permitting it to

file its intervening petition in said suit, setting forth its claims therein.

On consideration whereof it is ordered that said The Lake Shore & Michigan Southern Railway Company have leave to file an intervening petition in said suit on or before the 8th day of Feb., 1890, upon giving bond for costs.

Done in the city of Cleveland, Ohio, at chambers, this — day *day* of January *23*, 1890.

HOWELL E. JACKSON,
Circuit Judge.

And afterwards, to wit, on the same day, there was filed in the clerk's office of said court the following intervening petition, clothed in the words and figures following, to wit:

Intervening Petition of Lake Shore and Michigan Southern R'y Co.

In the Circuit Court of the United States, Eastern Div. of the Southern District of Ohio.

316 THE MERCANTILE TRUST CO., Trustee, *vs.* THE KANAWHA AND OHIO R'Y CO. } In Equity. No. 479.

Intervening petition of the Lake Shore & Southern Railway Co.

Now comes the Lake Shore & Michigan Southern Railway Company and files herein this its intervening petition and says:

1. That it, the Lake Shore & Michigan Southern Railway Co., is a railway corporation organized and incorporated under and by virtue of the laws of the several States of New York, Pennsylvania, Ohio, Michigan, Indiana, and Illinois, and as such is doing the business of a common carrier in said several States, having therein its main line of railroad with its connecting branches.

That as such common carrier it connected and had an interchange of business and traffic with the said Kanawha and Ohio Railroad Company, and has for several years last past.

That in the doing of such business and interchange of traffic, under contract and agreement with said railroad company, the said The Lake Shore & Michigan Railway Co., during the months of September and October, 1888, made certain repairs upon the cars of said Kanawha and Ohio Railroad Company coming into the possession of said The Lake Shore and Michigan Southern Railway Company, for which it was to be paid the sum of $102.77; bills of which were sent to said Kanawha and Ohio R. R. Co., and same were duly audited and allowed as correct.

That during the said month of October, 1888, four of the said The Lake Shore & Michigan Southern Railroad Company'- — were, by said last-named company, lost and destroyed whilse in transit over said Kanawha and Ohio Railroad Company's line, the value
317 of same amounting to $907.50; bill of which was also sent to said Kanawha and Ohio Railroad Company, and the same

allowed and audited as correct. The total amount of said bills for repairs and destruction of cars amounted to $1,010.27.

2. That on the 15th day of October, 1888, there was paid by said The Lake Shore and Michigan Southern Railway Company, at the instance and direction of the said Kanawha and Ohio R. R. Co., to J. L. Sebring & Co, of Kalamazoo, Mich., the sum of $868.95, being for the value of two cars of wheat shipped by said J. L. Sebring & Company from Kalamazoo, Michigan, over said Lake Shore & Michigan Southern railroad and received in good order by said Kanawha and Ohio Railway Co. and by said K. & O. R. R. Co. lost and destroyed while in transit upon its said road; which said amount was, on the 8th day of July, 1889, allowed and audited as a just claim in favor of said The Lake Shore and Michigan Southern Railway Company.

That also on the 15th day of October, 1888, there was paid by said The Lake Shore and Michigan Southern Railway Company, at the instance and direction of the said Kanawha and Ohio R. R. Co., to one F. W. Stock, of Hillsdale, Michigan, the sum of $1,259.24 for and on account of the loss of two cars containing three hundred barrels of flour shipped by the said F. W. Stock over said Lake Shore & Michigan Southern railway and received by said Kanawha and Ohio R. R. Co. in good order and condition and which was totally lost and destroyed whilst in its possession and in transit over said K. & O. R. R. Said claim was also allowed and audited as justly due to said The Lake Shore & Michigan South. R'y Co. from the Kanawha and Ohio R. R. Co.

The total amount of said claim is $3,067.73; which sum is now justly due and owing to said The Lake Shore & Mich. South. R'y Co. from the said Kanawha and Ohio R. R. Co., no part of which
318 has ever been paid.

Demand has been made by said The Lake Shore & Michigan South. R'y Co. upon said receiver for payment thereof, but whilst said receiver admits the correctness of the amount herein stated — declines to pay the said claim without an order of this honorable court directing him so to do.

Wherefore the said The Lake Shore & Michigan South. R'y Co. prays this honorable court to make an order upon the receiver herein, directing him to pay to the Lake Shore & Mich. South. R'y Co. the amount hereinbefore stated due to it out of any surplus moneys now in his hands, if such there be, and if not out of the income and earnings of said Kanawha and Ohio R. R. Co., and in the event that the same be insufficient to meet and pay said claim, then that said claim due said The Lake Shore & Michigan South. R'y Co. be paid out of the proceeds of the sale or other disposition of said property described in said complainant's bill; and said The Lake Shore & Michigan Southern Railway Company prays for such other and further equitable relief as it may be entitled to.

Said The Lake Shore & Mich. South. R'y Co. is informed and believes and so states the fact to be that a majority of the bondholders represented by said complainant, trustee, consents to an order of this court authorizing said receiver to issue a receiver's

certificate to said The Lake Shore & Mich. South R'y Co. to pay its said claim.

THE LAKE SHORE & MICHIGAN SOUTHERN R'Y CO.,
By E. D. POTTER, JR., *Its Solicitor.*

319 UNITED STATES OF AMERICA, }
Northern District of Ohio, Eastern Division. }

STATE OF OHIO, }
Cuyahoga County, } *ss:*

C. P. Leland, being duly sworn according to law, says that he is the auditor of the Lake Shore & Michigan South. R'y Co.

That the facts stated in the foregoing intervening petition upon information and belief he believes to be true, and as to all other facts and matters therein stated the same are true in substance and in fact.

C. P. LELAND.

Sworn to before me and signed in my presence this 23 day of January, 1890.

L. ROOD LOOMIS,
[SEAL.] *Notary Public, Cuyahoga Co., O.* [SEAL.]

I hereby guaranty costs.

E. D. POTTER, JR.

And afterwards, to wit, on the 20th day of February, A. D. 1890, the following intervening petition of the Adams Express Co. was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Intervening Petition of the Adams Express Company.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST CO. }
vs.
THE KANAWHA AND OHIO R'Y CO. }

Intervening petition of the Adams Express Company.

320 Your petitioner, having obtained leave of court to file its intervening petition, says that it is a joint stock company duly organized and existing under the laws of the State of New York.

In 1883 the Ohio Central Railroad Company was the owner and in possession of the railroad involved in this suit and mentioned and described in the bill of complaint herein, and had duly executed a mortgage thereon to the Central Trust Company of New York to secure its bonds to the amount of $—.

On November 20, 1883, said Central Trust Co. duly filed its bill of complaint in *in* equity in the district court of the United States, district of West Virginia, exercising circuit court power in the district of West Virginia, against said Ohio Central Railroad Company to foreclose said mortgage. Said court, having duly acquired jurisdiction over said property and over said Ohio Central Railroad Company, on November *q*1, 1883, upon the application of said Central Trust Company and with the consent of all parties, duly appointed Thomas R. Sharpe receiver of said railroad, with power to operate and manage the same, and said Sharpe thereupon duly qualified as such receiver and took possession of so much of said railroad as is in the State of West Virginia and thereafter managed and operated the same as such receiver.

On December 13, 1883, said court duly entered an order in said cause in the words and figures following, to wit:

"On reading and filing the verified petition of Thos. R. Sharpe, receiver of the Ohio Central railroad, and it appearing therefrom that it is necessary for the protection and preservation of the property of said railroad company that certain bridges should be
321 repaired and certain portions of the road-bed of said railroad be ditched and ballasted and certain necessary expenses of maintenance, repair, and management be provided for, and that a sum not exceeding fifty thousand dollars will be required for the purposes aforesaid, on motion of William H. De Lancey, solicitor for said receiver—

Ordered that said Thomas R. Sharpe, receiver of the Ohio Central Railroad Company, be, and he is hereby, authorized and empowerd to issue certificates of indebtedness to an amount not exceeding fifty thousand dollars, and bearing interest at the rate of six per cent. per annum and payable not exceeding twelve months after date at the city of New York, for the purposes aforesaid, with power to renew the same.

The said certificates shall be a first and paramount lien on so much of the property of the said Ohio Central Railroad Company now in his possession or which he may hereafter get actual possession of and the revenues thereof.

That the said receiver shall not negotiate such certificates at less than their face value without the further order of the court.

And it is further ordered that said receiver pay said certificates so issued as aforesaid and the interest thereon out of the revenues of said railroad company as received by him from time to time."

And on March 24, 1884, said court duly entered a further order in said cause in the words and figures following, to wit:

322 "On reading and filing the verified petition of Thomas R. Sharpe, receiver of the Ohio Central Railroad Company, and it appearing therefrom that the said receiver cannot sell or negotiate the certificate- of indebtedness heretofore authorized to be issued by order of this court, dated 13th December, 1883, without paying a commission for the sale or negotiation of the same, now, on motion of William H. De Lancey, solicitor for said petitioner, it is ordered that said Thomas R. Sharpe, receiver of the Ohio Cen-

tral Railroad Company, be, and he is hereby, authorized, empowered, and directed to sell or negotiate the certificates of indebtedness heretofore authorized to be issued by him by order of this court dated 13th December, 1883, upon such terms and at such rates as he may deem proper and as he may be able to obtain."

Both of said orders remain in full force and are unreversed. Your petitioner, on the faith thereof and in consideration of receiver's certificates simultaneously delivered to it by said Sharpe, paid to said Thomas R. Sharpe, receiver aforesaid, the following sums of money upon the following days, taking from said Sharpe, upon the occasion of each of said payments, receiver's certificate for the amount so paid to him, to wit:

323	April 16, 1884	$14,300 00
	April 16, 1884	102 34
April 16, 1884		1,600 00
May 1, 1884		4,000 00
May 30, 1884		4,200 00
July 24, 1884		5,000 00
October 1, 1884		533 05
April 3, 1885		3,500 00
June 7, 1885		1,200 00
August 29, 1885		1,500 00
		$35,935 39

The following is a copy of the receiver's certificates delivered by said Sharpe to the petitioner upon the occasion of the first of said payments by it to him, and the residue of said certificates (being ten in all) are identical therewith excepting in dates and amounts. The dates and amounts of said several certificates are as set forth in the foregoing schedule of the dates and amounts of money paid by the petitioner to said Sharpe, aggregating said amount of $35,935.39, to wit:

No. —. OHIO CENTRAL RAILROAD CO.,
RECEIVER'S OFFICE, *Ap'l* 16, 1884.

In pursuance of an order of the district court of the United States for the district of West Virginia, this is to certify that Thomas R. Sharpe, as receiver of the Ohio Central Railroad Co., will pay to Adams Express Co. or order, one day after date, the sum of fourteen thousand three hundred dollars, with interest at the rate of six per cent. per annum.

324

Receiver's certificates.

This certificate is a first and paramount lien on the property and revenues of the Ohio Central Railroad Co. in possession of Thomas R. Sharpe, receiver, is transferable by endorsement, and payable at 59 B'way, New York city.

THOS. R. SHARPE,
Receiver Ohio Central Railroad Co.

Your petitioner says that by virtue of the premises it acquired a first and paramount lien upon all of said railroad in the State of West Virginia to secure the payment of the several sums mentioned in said ten receiver's certificates.

A decree of foreclosure was subsequently entered in said suit, under which said railroad was sold to a committee of the bondholders under said mortgage to the Central Trust Company, who turned in the bonds secured by said mortgage in payment of the purchase price, and thereupon organized the defendant corporation The Kanawha and Ohio Railway Co. and executed the mortgage sought to be foreclosed herein, and distributed the stock of said Kanawha & Ohio Railway Company and the bonds secured by said mortgage to the Mercantile Trust Co. *pro rata* among the owners and holders of the bonds secured by said mortgage of the Ohio Central Railroad Company to said Central Trust Company; and said stock and mortgage bonds of said Kanawha and Ohio Railroad
325 Company are still almost wholly, if not altogether, held by the said original distributees.

No provision was made in said proceedings in the district court of the United States for the district of West Virginia for the payment of said certificates so issued to and held by the petitioner, and no notice was ever given to your petitioner to present the same for payment, and the same are wholly unpaid and due to it, with interest thereon.

Your petitioner says that its lien aforesaid to secure the payment of said receiver's certificates has never been barred or foreclosed, and that it remains in full force and effect and paramount to the title of said Kanawha and Ohio Railway Company and to the lien of said mortgage to the Mercantile Trust Company, both of which parties took their said title and lien with notice of your petitioner's lien.

Wherefore your petitioner prays that said receiver's certificates may be declared a first and paramount lien upon so much of said railroad as is in the State of West Virginia, and that out of the proceeds of the sale thereof it may be first paid the amount of said certificates, with interest. It prays for all other relief to which it may be entitled.

RAMSEY, MAXWELL & RAMSEY, *Att'ys.*

326 And afterwards, to wit, on the 21st day of February, A. D. 1890, the following petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition of Robert W. Kelley.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant,
against
THE KANAWHA AND OHIO RAILWAY COMPANY and Others, Defendants.

Petition of Robert W. Kelley, receiver.

I, Robert W. Kelley, receiver herein, respectfully show to this honorable court as follows:

1. I beg to refer to my petition herein filed March 13, 1889, asking leave to make certain payments for labor performed for and supplies furnished to the Kanawha and Ohio Railway Company shortly prior to my appointment as receiver, and also to make payments for taxes, and also to make pa-ments upon rolling-stock contracts, and I also refer to the order of the court entered thereon; also to my petition for leave to make payments on equipment account, filed herein in October last, and to the order of the court thereon.

2. I have not been able to obtain the assent of the holders of all the bonds secured by the mortgage sought to be foreclosed herein, which assent was made conditional to the operation of said order, except with respect to taxes, until the further order of this
327 court, and I therefore desire the further order of the court with respect to the matters referred to in said petition and said order. Of eleven hundred and sixty bonds outstanding under said mortgage the holders of nine hundred or more thereof consent that I, as receiver, pay the indebtedness of the said railway company for labor, services, supplies, and materials referred to in said petition, and also all sums which are or may become due under any of the rolling-stock contracts mentioned in said petition, and that for these purposes I be authorized to borrow money and to issue receiver's certificates in such form and manner and upon such terms as the court may approve, and written evidence of such consent is presented herewith.

3. Immediately after my appointment, upon taking possession of the railroad, I received of cash and credits, which have since been collected, $27,774.45, and supplies then valued at $15,853.29. As against the credits, there were payments required to be made, in order to collect some of said credits, amounting to about $7,000. On the other hand, the supplies have proved to be of larger value than the estimate at that time, particularly because a considerable part thereof was in rails, which have increased in value, some of which have since been sold at a higher price than they were then estimated to be worth, and the remainder of which are in use in the railroad. Making allowances for the counter-changes on the one hand and the increase in value of supplies on the other, the net cash credits and supplies received by me from the railroad company

at the time I took possession of the railroad would amount to about $39,000, or just about the sum total of the labor and supply claims, as stated in the said petition of March 13, 1889.

328 4. The taxes referred to in said petition have since been paid, and there are now outstanding receiver's certificates, which were issued for that purpose, to the amount of $10,000.

5. Upon the rolling-stock contracts, under authority of the order of October last, I have paid the following amounts:

To the Pullman Palace Car Company	$9,233 79
To Burnham, Parry, Williams & Co	4,914 87
On the equipment bonds secured by the Robert Seney trust agreement, assigned to the Atlantic Trust Company	3,974 22

There are now due and unpaid under said rolling-stock contracts the following:

Under the Burnham, Parry, Williams & Co. contract, Exhibit "A" to said petition, all payments have been completed and nothing remains unpaid thereon.

Under the Burnham, Parry, Williams & Co. contract, Exhibit "B" to said petition, there still remain unpaid six promissory notes of $964.43 each, amounting in the aggregate to $5,786.58, all of which are overdue.

Under the Pullman Palace Car Company agreement, Exhibit "C" to said petition, there still remain unpaid ten notes for $2,980.41 each, which amount in the aggregate to $29,804.10, due one each month from June 1st, 1889, all of which are overdue except the last one, which falls due on the 1st of March, 1890.

329 Under the Robert Seney agreement there remain unpaid bonds for $56,000, on account of which, by the terms of the agreement, $8,000 should have been paid on the first day of November last.

6. All of the rolling stock covered by these contracts as at all times during my receivership been necessary to the proper operation of the road and still is so necessary. The reasonable rental of the same for a year I estimate to be as follows:

For the ten locomotives covered by the two Burnham, Parry, Williams & Co. contracts, Exhibit "A" and "B," $1,500 each, aggregating	$15,000
For the 200 box cars covered by the Robert Seney contract, 25 tons capacity each, $75 each per annum	15,000
For the 100 box cars, 25 tons capacity, under the Pullman Palace Car Co. contract, $75 each	5,500
For the 150 gondola cars, under the same contract, 25 tons capacity, $50 each	7,500
For the 64 gondola cars, under the same contract, 15 tons capacity, $40 each	2,560
The total rental for all this rolling stock for the year would therefore be	$47,560

330 This estimate I consider a conservative one. Undoubtedly it would be impossibly for me to obtain upon lease other rolling stock of the same kind for use upon this road at these figures.

7. I have received for mileage of these cars while engaged on other roads, up to the 31st day of December, 1889, the sum of $16,306.40, in addition to having had the use of the cars upon the Kanawha and Ohio railroad.

Wherefore I respectfully ask the instructions of the court in the premises, and that authority be given me as receiver as aforesaid to pay the indebtedness for labor, services, supplies, and materials hereinbefore referred to, and also all sums which are or may become due under any of the rolling-stock contracts mentioned in said petition; also all sums which are or may become due for taxes on the railroad and other property in my possession as such receiver, and that for these purposes I be authorized to borrow money; to issue receiver's certificates in such form and manner and upon such terms as the court may approve, and for such other order and directions in the premises as may be proper.

All of which is respectfully submitted.

ROBERT W. KELLEY.

Sworn to and subscribed before me this Feb. 21, 1890.

H. M. DOCK, *Clerk.* [SEAL].

331 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

MERCANTILE TRUST CO.
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY.

We, the undersigned, holding or representing first-mortgage bonds of the Kanawha and Ohio Railway Company bearing the numbers set opposite our names, referring to the petition of Robert W. Kelley, receiver, filed herein on March 13, 1889, and the order of this court thereupon, do hereby consent that the receiver herein pay the indebtedness of the Kanawha and Ohio Railway Company for labor, services, supplies, and materials referred to in said petition, and also all sums which are or may become due under any of the rolling-stock contracts mentioned in said petition, and that for these purposes he be authorized to borrow money and to issue receiver's certificates in such form and manner and upon such terms as the court may approve.

Nos.				
522, 524, 528, 531	M. A. & S. A. White,	4	bonds..	$4,000
387, 632–6, 405–8	James B. Metcalf,	10	" ..	10,000
399, 400, 402, 412, 486–489, 493, 333, 521, 653–6	T. W. Downer,	15	" ..	15,000
No. 761	A. T. Buon for Warren Delau,	1	" ..	1,000
385, 413, 414	D. Stewart,	3	" ..	3,000
322, 381–3, 496	S. Levy & Co.,	5	" ..	5,000
363, 421	W. P. Palmer,	2	" ..	2,000
324–5, 729–31	T. A. Tazy,	5	" ..	5,000
350–354	W. B. Lawrence,	5	" ..	5,000

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369–73, 543	J. E. Fisher	6,000
320	O. S. Ackley	6,000
544, 763, 764	James G. de Forest	3,000
509, 518	E. St. John Hays	2,000
374–5	Lehman Bros	2,000
498	Schroder & Bro	1,000
510, 516, 512, 513, 519	Jacob Hays	5,000
508, 520	Jos. A. Osborn, by Jacob Hayes	2,000
475	Cornelia L. Marshal, ex	1,000
514–5	Charles Duggin	2,000
782	E. St. John Hayes & Co. for C. C. Bedell.	1,000
475, 752	Timothy Donovan	2,000
679, 685, 728, 480	Barnett Levison	4,000
393–4	J. C. Lemedy, Tod & Co	2,000
312–3, 760	Charlotte J. M. Gomkey	3,000
359, 777	J. H. Small	2,000
341, 342, 403	W. H. Harris	3,000
340	Stephen W. Carey	1,000
783–4	W. C. Sheldon & Co	2,000
759	C. Von Hesse	1,000
779	Joseph H. Lanny	one-thousand-dol. bonds.
429	H. R. Goodnow, ex'r	1,000

333 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY.

We, the undersigned, holding or representing first-mortgage bonds of the Kanawha and Ohio Railway Company bearing the numbers set opposite our names, referring to the petition of Robert W. Kelley filed herein on March 13, 1889, and the order of this court thereupon, do hereby consent that the receiver herein pay the indebtedness of the Kanawha and Ohio Railway Company for labor, services,

supplies, and material referred to in said petition, and also all sums which are or may become due under any of the rolling-stock contracts mentioned in said petition, and that for these purposes he be authorized to borrow money and to issue receiver's certificates in such form and manner and upon such terms as the court may approve.

C. W. Roberts, 45 bonds, Nos. 463–474, 530, 532, 542, 551, 553, 364, 559, 732, 733, 326, 578–584, 360, 753, 754, 776, 778, 555–557, 648, 651, 567, 615, 652, making.....	$45,000
643, 691, Barrett Bros., two bonds.....	2,000
501–'2, 545, Wm. E. Bond, three bonds.....	3,000

334 Circuit Court of the United States, Southern District of Ohio, Eastern District.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY.

We, the undersigned, holding or representing first-mortgage bonds of the Kanawha and Ohio Railway Company bearing the numbers set opposite our names, referring to the petition of Robert W. Kelley filed herein on March 13, 1889, and the order of this court thereupon, do hereby consent that the receiver herein pay the indebtedness of the Kanawha and Ohio Railway Company for labor, services, supplies, and material referred to in said petition, and also all sums which are or may become due under any of the rolling-stock contracts mentioned in said petition, and that for these purposes he be authorized to borrow money and to issue receiver's certificate in such form and manner and upon such terms as the court may approve.

H. D. Whitcomb, No. 504, one bond.....	$1,000
Chas. E. Worthman, No. 427 & 483, 2 bonds.....	1,000 each.
A. L. Boulware, one bond.....	1,000
Davenport Co., Nos. 424, 425, 426, and 505 of 1,000 each.	4,000
Isaac Davenport, Jr., No. 503.....	1,000

335 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

MERCANTILE TRUST CO.
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY.

We, the undersigned, holding or representing first-mortgage bonds of the Kanawha and Ohio Railway Company bearing the number set opposite our names, referring to the petition of Robert W. Kelley, receiver, filed herein on March 13, 1889, and the order of this court thereupon, do hereby consent that the receiver herein pay the indebtedness of the Kanawha and Ohio Railway Co. for

labor, services, supplies, and materials referred to in said petition, and also all sums which are or may become due under any of the rolling-stock contracts mentioned in said petition, and that for these purposes he be authorized to borrow money and to issue receiver's certificates in such form and manner and upon such terms as the court may approve.

JOHN W. SIMPSON (thirty),	$30,000.
E. C. HOMANS (eighty-five),	85,000.
SAM'L L. COST, JR. (ninety),	90,000.
GRINNEL BURT, P'r HOMAN & CO., (twenty-five),	25,000.
HOMANS & CO. (five hundred & ten),	510,000.
ROB'T W. KELLEY,	5,000.

336 30. 266–291, inclusive.

85. 334 to 337, inclusive; 772, 983 to 1007, inclusive; 554, 523, 529, 546 to 549, inclusive; 492, 493, 327 to 331, inclusive; 404 to 406, inclusive; 409 to 411, inclusive; 388 to 392, inclusive; 668 to 671, inclusive; 838 to 842, inclusive; 563, 681, 626 to 630, inclusive; 436, 437, 637 to 642, inclusive; 460, 461, 621 to 624, inclusive.

90. 319, 869 to 907, inclusive; 162 to 211, inclusive; 292 to 311, inclusive; 1215, 788, 789, 785, 786, 773, 769, 770, 534 to 539, inclusive; 506, 908 to 957, inclusive; 358, 525, 550, 585 to 589, inclusive; 610 to 614, inclusive; 644 to 647, inclusive; 672 to 678, inclusive; 1164 to 1213, inclusive; 1216 to 1290, inclusive; 759, 1139 to 1163, inclusive; 751, 741, 609, 616 to 618, inclusive; 348, 349, 743 to 749, inclusive; 658 to 662, inclusive; 833 to 837, inclusive; 343 to 347, inclusive; 590 to 608, inclusive; 843 to 868, inclusive; 212 to 261, inclusive; 112 to 161, inclusive; 1039 to 1138, inclusive; 687, 679 to 982, inclusive.

337 And afterwards, to wit, on the 21st day of February, A. D. 1890, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Nelson Robinson.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee,
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY and Others.

Nelson Robinson, being first duly sworn, says:

Erwin Davis, who has heretofore filed an intervening petition herein, to-day showed me a letter from Simpson, Thacher & Barnum, a copy of which is attached hereto, and we had some conversation con-ning the matters therein referred to.

I stated to him that application would be made to the court for authority to pay debts of the railway company existing at the time

the receiver was appointed for labor and services, amounting to about $20,000, and for materials, supplies, bridges, etc., amounting to about $36,000, and for authority to make payments upon the rolling-stock contracts and for authority to issue receiver's certificates to raise money for these purposes, and that the amount of receiver's certificates thus provided for, if the application should be granted, would be about $90,000. I urged him to give his consent as a bondholder to the granting of these applications, specially urging as to the rolling-stock contracts that he had made them all himself. He stated to me, after some talk on the matter, that he would not oppose, but that he could not give a formal consent, as it might prejudice his position to recognize Receiver Kelley in any way.

NELSON ROBINSON.

338 Sworn to before me this 18th day of February, 1890.

PHILIP G. -ARTLETT,
Notary Pub., New York County. [SEAL.]

Law office of Simpson, Thatcher & Barnum, 10 Wall street, New York.

John W. Simpson, Thomas Thatcher, William M. Barnum, Phillip G. Bartlett.

(Copy.)

FEB. 17, 1890.

Erwin Davis, Esq., 2 Wall St., New York.

DEAR SIR: We beg to notify you that on Friday, the 21st inst., at Nashville, Tenn., we shall present to Judge Jackson, of the Ohio circuit, for determination various matters as to payments to be made by the receiver of the Kanawha and Ohio railway, and as to issue of receiver's certificates therefor, and as to instructions to the receiver referring to the petitions filed in the Ohio court by the receiver in March of last year, and the orders entered thereon, and also the intervening petitions of some claimants for labor, supplies, etc., most of which matters were brought up before Judge Sage on December 5th, but were not passed on by him, because he preferred that
339 Judge Jackson, having already made some orders in *in* the premises, should hear these matters.

Very truly yours,

SIMPSON, THATCHER & BARNUM.

And afterwards, to wit, on the 21st day of February, A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, p. 217.

Now, on this 21st day of February, 1890, comes Robert W. Kelley, receiver herein, and files his petition, verified this day, in which he refers to his petition filed herein on the 13th day of March, 1889, and the order of the court thereon, made on said day, and also to

his petition filed herein on the 7th day of October, 1889, and the order of the court thereon, and asks for the further instructions of the court with respect to the matters therein referred to, and said receiver presents consents of bondholders, referred to in said petition, which are filed herewith; and also comes the complainant, by Simpson, Thatcher & Barnum, its solicitors; and also comes the defendant, The Kanawha and Ohio Railway Company, by Knight & Couch, its solicitors; and comes also the Lake Shore & Michigan Southern Railway Company, by E. D. Potter, Jr., its solicitor, and refers to its intervening petition, filed herein January 26, 1890; and come also the intervening petitioners, Edwin Thatcher, E. S. Bright, Henry O'Blenness, and Henry R. Mathias, by L. M. Jewett, their solicitors, and refer to their several petitions herein, and it appears that Erwin Davis was notified of this hearing.

And the matters arising upon said petitions were presented by counsel and fully considered, and, it appearing to the court
340 that holders of nine hundred and two of the eleven hundred and sixty bonds outstanding under the mortgage herein sought to be foreclosed consent to the granting of the prayer of the petition of the receiver, and that holders of a large portion of the remainder of said bonds, being duly advised of this hearing, do not oppose, and it not appearing that any bondholder objects thereto, and it further appearing that the receiver, immediately after his appointment, received in cash or its equivalent, being accrued earnings of the railway company, a sum equal to the labor debts mentioned in his petition, and supplies equal in value to and largely identical with the supplies referred to in said petition, and it further appearing that of the petitioners represented by L. M. Jewett the petitioner Thatcher has a statutory lien on the railroad for his claim, and that the others are among the supply creditors, and it further appearing that the claim of the Lake Shore & Michigan Southern Railway Company properly belongs to and should be included in the class of claims referred to in said receiver's petition, and it further appearing that the payments on rolling-stock contracts, besides being consented to as aforesaid, are clearly such as will benefit all persons interested in the property in the possession of the receiver—

It is ordered that the receiver herein be, and is hereby, authorized to pay the indebtedness for labor, services, supplies, and materials mentioned in his said petition, filed March 31, 1889, including the indebtedness mentioned in the petitions of said Bright, O'Blenness, and Mathias, and also the indebtedness mentioned in the petition of said Thatcher, and also the indebtedness mentioned in the petition of said Lake Shore and Michigan Southern Railway Co.,
341 and also any amounts due or that may become due for taxes upon the property in his possession, and also any sums due or that may become due under any of the rolling-stock contracts mentioned in his said petition, and he is authorized to borrow the money necessary to make such payments, and for the money so borrowed to make and issue his certificates of indebtedness, bearing interest from the date thereof until paid, at the rate of six per cent.

per annum, and to sell and dispose of such certificates at not less than the par value thereof, and to pay a commission of not more than two and one-half per cent. of the face of such certificates for the negotiation thereof, and to use the proceeds to make the payments aforesaid, his certificates to be substantially in the form prescribed in the order herein entered March 13, 1889.

And it is ordered that said certificates be, and they are hereby, made and declared to be a debt of the said Robert W. Kelley as receiver of the railroad and property of the defendant railway company, incurred for the benefit and protection of the said railroad and other property in his hands, and a lien prior to the lien of the mortgage or deed of trust, to foreclose which this suit is brought, on the railroad and other property covered by said mortgage or deed of trust, and that the earnings of said railway, after deducting the expenses of operating, maintaining, preserving, and keeping in repair the said railroad and other property and the expense of the receivership herein, shall be applicable to the payment of the principal and interest of the said certificates.

But the aggregate sum for which certificates shall be issued hereunder shall not exceed the sum of ninety thousand dollars.

342 And afterwards, to wit, on the 25th day of February, A. D. 1890, the following answer to intervening petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer to Intervening Petition.

United States Circuit Court, Southern District of Ohio, Eastern Division,

THE MERCANTILE TRUST COMPANY, Trustee,
against
THE KANAWHA AND OHIO RAILWAY COMPANY and Others.

The Mercantile Trust Co., answering the intervening petition of the Adams Express Company, states as follows:

I. So far as the allegations of said petition concern the pleadings, proceedings, orders, decrees, and matters in the cause heretofore pending in the United States district court in West Virginia, in which The Central Trust Company was complainant and The Ohio Central Railroad Company was defendant, it begs leave for greater accuracy and fullness to refer to the record of said cause or any part thereof, and generally with respect to any matters arising upon said petition it begs leaves to refer to said record or any part thereof, but it denies that Thomas R. Sharpe was appointed receiver of said railroad upon the application of the said Central Trust Company
343 or with its consent or the consent of all parties, as alleged in the petition.

II. It denies the allegation contained in the words "Both of said orders remain in full force," which are found immediately

after the statement of the order of March 24, 1884, in said petition.

III. It has no knowledge or information sufficient to form a belief as to whether any of the allegations of said petition with respect to payments by the petitioner to Thomas R. Sharpe, receiver, or issue or delivery of receiver's certificates by said receiver to said petitioner are true, and therefore it denies all the said allegations. It denies that any money received by said Sharpe from the petitioner upon receiver's certificate was paid, received, or used for the purposes specified in said order of December 13, 1883, or for any other purposes of said receivership or for the benefit of the property held therein or of the parties to said cause.

IV. As to the allegations on the fourth page of said petition "that by virtue of the premises it acquired a first and paramount lien upon all of said railroad in the State of West Virginia to secure the payment of the several sums mentioned in said ten receiver's certificates," it is advised that this is mere conclusion of law; but whether it be conclusion of law or allegation of fact, it denies the same.

V. It admits that a decree of foreclosure was entered in said cause, but as to the date and terms thereof it refers to said record. It admits that under said decree the said railroad—that is, the railroad in said decree described—was sold to a committee representing many, but not all, of the bondholders under said mortgage to the Central Trust Co., and also holders of other bonds and holders of stock of the Ohio Central Railroad Company,
344 and that said committee turned in some of the bonds secured by said mortgage, not all of them, in payment of part of the purchase price, paying, however, nearly $200,000; said purchase price in cash, a part of which was paid in for distribution upon bonds not represented by said committee. It admits that said committee thereafter caused the defendant railway company to be organized, and that thereafter said railway company executed the mortgage sought to be foreclosed herein. It denies that said committee "distributed the stock of said Kanawha and Ohio Railway Company and the bonds secured by said mortgage to the Mercantile Trust Company *pro rata* among the owners and holders of the bonds secured by said mortgage of the Ohio Central Railroad Company to said Central Trust Company." Less than ten per cent. of the said bonds of the Kanawha and Ohio Railway Company now outstanding and less than one-half of the outstanding stock of said company were distributed among the owners and holders of the said bonds of the Ohio Central Railroad Company, and such bonds were so distributed among all the parties represented by said committee only to an amount equal to the cash paid in by them and used, among other things, to pay the cash portion of the purchase price aforesaid. The total amount of said bonds distributed among all said parties was only $521,000, and the total amount of stock so distributed was only about $10,000,000, par value, while the amount of said bonds now outstanding is $1,160,000, and the amount of said stock not outstanding is $12,200,000. The said bonds and

stock not distributed as aforesaid were returned to the treasury of said Kanawha and Ohio Railway Company, and thereafter from time to time sold by it. It denies the allegation that "said
345 stock and mortgage bonds of said Kanawha and Ohio Railway Company are still almost wholly, if not altogether, held by the said original distributees." The original distributees were not as alleged and very little of said stock, if any, and very few of said bonds, if any, remain in the hands of persons who received the same from said committee. Except as in this paragraph admitted, it denies each and every allegation in that paragrap- of the petition which begins on the 4th page with the words "a decree of foreclosure," and ends on the fifth page with the words "said original distributees."

VI. It admits that no provision was made in said proceedings in the district court of the United States for the district of West Virginia for the payment of any receiver's certificates, and it has no knowledge or information sufficient to form a belief as to whether any notice was ever given to the petitioner otherwise than as appears by the record of said cause in respect to any certificates, and it avers that of the petitioner received any certificates as alleged it was bound to take notice of all proceedings in said cause and had constructive notice of all proceedings therein, and it avers that no issue of receiver's certificates is anywhere shown in said cause, no receiver's certificates were ever presented for payment therein, nor were any receiver's certificates *were* ever presented for payment therein, nor were any receiver's certificates ever therein brought to the attention of the court or any relief asked in respect thereto, notwithstanding the fact that by its decree of December 12th,
346 1885, by which the sale was confirmed, it was expressly referred to a commissioner to ascertain and report the receiver's indebtedness; that the commissioner thereafter reported thereon, and that in its decree of June 10th, 1886, by which the hold of the court upon the property sold was finally released, the court approved such report and acted thereon.

VII. It admits that the certificates issued to the petitioner, if any there were, are wholly unpaid, but it denies that they are due to it, in whole or in part, either with or without interest.

VIII. As to the allegations in the last paragraph of said petition, it is advised that for the most part they are of matters of law to be determined by the record in said cause in West Virginia, to which it again asks to refer; it denies that petitioner ever had a lien upon said railroad or any part thereof; it denies that the petitioner's lien, if it ever had any, remains in full force and effect or has any force or effect against the said property or otherwise, and it denies that the Kanawha and Ohio Railway Company took its title or claim or this complainant took its lien with notice or any lien or claim of lien on said property in favor of the petitioner; on the contrary, it avers that said property was sold as free from all liens, except the liens of the Ohio Central Mineral Division mortgages mentioned in the decree, and was so intended to be sold by the court, and was so understood to be sold by the purchasers, and

that neither said purchasers nor their grantees nor the said Kanawha and Ohio Railway Company nor this complainant before November last knew that the petitioner had or claimed to have any lien whatever upon said railroad or any ——.

347 Wherefore it prays that the prayer of said petition be in all respects denied, and that said petitioner be ordered to pay the costs of this proceeding.

THE MERCANTILE TRUST COMPANY,
By H. C. DENNING, *Secretary.*

SIMPSON, THATCHER & BARNUM, *Solicitors.* [SEAL.]

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

H. C. Deming, being duly sworn, says that he is the secretary of the Mercantile Trust Company aforesaid; that he has read the foregoing answer, and that the allegations thereof are true, as he verily believes.

H. C. DEMING.

Sworn to before me this 21st day of February, 1890.
PHILIP S. BARTLETT,
[SEAL.] *Notary Pub., New York County.*

348 And afterwards, to wit, on the 25th day of February, A. D. 1890, the following answer to intervening petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer to Intervening Petition.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee,
against
THE KANAWHA AND OHIO RAILWAY COMPANY and Others.

The Kanawha and Ohio R'y Co., for answer to the intervening petition of the Adams Express Company, adopts the answer of the Mercantile Trust Company thereto which was verified the 21st day of Feb., 1890, by H. C. Deming, and repeats the allegations and denials therein contained, and prays that the prayer of said intervening petition be in all respects denied, and that said intervening petitioner be ordered to pay the costs of this proceeding.

THE KANAWHA AND OHIO RAILWAY COMPANY,
By W. P. PALMER, *Secretary.*

KNIGHT & COUCH, *Solicitors.*

349 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

W. P. Palmer, being duly sworn, says that he is the secretary of the Kanawha and Ohio Railway Co. aforesaid; that he has read the foregoing answer and the answer of the Mercantile Trust Co. therein referred to, and that the allegaotions of both said answers are true, as he verily believes.

W. P. PALMER.

Sworn to before me this 21st day of February, 1890.

PHILIP S. BARTLETT,
Notary Public, New York County. [SEAL.]

And afterwards, to wit, on the 1st day of March, A. D. 1890, the following petition of Erwin Davis was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition of Erwin Davis.

To the Honorable J. M. Harlan, associate justice of the Supreme Court of the United States:

Your petitioner, Erwin Davis, of the city and State of New York, respectfully represents that there is a suit in equity now pending in the circuit court of the United States for the southern
350 district of Ohio, in which The Mercantile Trust Company of the City and State of New York is the complainant and The Kanawha and Ohio Railway Co., a corporation created, organized, and existing under the laws of the States of Ohio and West Virginia, and others, are defendants, the general object of which is to foreclose a certain mortgage or deed of trust alleged to have been given by the said Kanawha and Ohio Railway Company to the complainant, as trustee, to secure the payment of bonds given by said railway company in the amount of $1,060,000, which mortgage and bonds were given in 1886, the principal to mature in fifty years from date and the interest to be paid in semi-annual instalments, and also to secure the sale of certain other property, to wit, $1,000,000 in bonds and $998,000 of stock of the Point Pleasant Bridge Company, said to have been delivered by said railway Co. to said complainant by way of pledge or collateral security for the payment of said bonds of said railway company. (See amendee bill, pp. 1 to 15 of the accompanying record.)

It will be seen by reference to the said amended bill and the proceedings thereon that the said railway company made no defense to said suit, and, upon learning that it was its intention to make no defense, but to consent to a sale of the road and all property embraced in the mortgage without the necessary and proper proceedings being first had in said cause, your petitioner, being a large owner of the bonds and stock of said railway company, filed his petition in said cause and was permitted to intervene therein, and thereupon, in his said petition, showed to the court that he is the

owner in his own right of more than $100,000 of the bonds secured by the said mortgage or deed of trust sought to be foreclosed in said suit and the owner of $500,000 of the par value of each
351 class of the stock of said Kanawha and Ohio Railway Company, to wit, the common and preferred stock, and is largely interested in the financial condition of said company and in having its assets justly and fairly devoted to the payment of its just debts.

Your petitioner showed and insisted that it appeared in and by said bill that there were other and prior mortgages upon portions of the property of the said railway company known as the Mineral Division mortgages, but that the bill and proceedings do not show upon what portion of the road or property said last-mentioned mortgages are or the amount thereof, and that neither the beneficiaries nor the trustees under such mortgages are made parties to the suit; that said bill alleges that others, who are made parties to said suit, claim an interest in said property, but that such interest was acquired subsequent to the mortgage sought to be foreclosed, but that the nature and extent of such interest is not set forth in said bill; that said bill also shows that said trustee, complainant, holds $1,000,000 of the bonds and $998,000 of the stock of the Point Pleasant Bridge Company, a West Virginia corporation, as additional security for the payment of said bonds mentioned in the mortgage sought to be foreclosed, said $1,000,000 in bonds, secured by mortgage on the said bridge, being the entire issue of said bonds, and the $998,000 being all of the stock of said bridge company, except $2,000; that it does not appear that the bridge company is in default in paying interest on its bonds or is insolvent, and he insists that this collateral security should be first exhausted.

Your petitioner also set forth in his petition filed in said cause that the said bill for foreclosure alleged that the said Kanawha and Ohio Railway Company had a floating debt of about $350,000,
352 and it is also shown by the petition of your petitioner filed in said cause; that the said last-named corporation, on the 7th day of August, 1889, in a suit then pending against it in the circuit court for the county of Kanawha, in the State of West Virginia, in which The Kanawha Improvement Company was plaintiff and in which no declaration had been filed showing what the alleged cause of action was, confessed a judgment in favor of said Kanawha Improvement Company in the sum of $285,233.30, and that your petitioner, as a bondholder and stockholder of said Kanawha and Ohio Railway Company, in behalf of himself and all other stockholders and creditors thereof, had filed a bill in equity in said last-named court impeaching said judgment for fraud and praying to have it annulled and set aside and filed with his said petition *or* copy of said bill, and he insisted in and by his petition that no sale of the said property of said Kanawha and Ohio Railway Company should be decreed until after the liens thereon and the priorities thereof should first be ascertained by a proper reference to and report of a master and the validity of said judgment determined. (See said petition, pp. 93 to 105 of accompanying record.) But the said court, without first determining any of said questions and

without any reference at all, except for the purpose of ascertaining the amount of the outstanding bonds, which reference was made on the 5th day of December, 1889, to B. R. Cowen as master and his report filed the same day (see Record, pp. 136 and 137), proceeded, on the said 5th day of December, 1889, to and did render a final decree in said cause (see Record, p. 139) directing the sale of all the property mentioned in said mortgage, including the bonds and stocks of the Point Pleasant Bridge Company as a whole, and directing the application of the purchase-money to a large

353 *and directing the application of the purchase-money to a large* extent. This decree was made upon the bill taken for confessed without any previous reference to ascertain the owners of the outstanding bonds, and no holder of bonds has proved them in said cause or made a demand to have said property sold so far as the record discloses, and, as your petitioner is advised and believes, said decree has been made without the necessary and proper steps to render the same legal and proper, and he is also advised and believes that it is erroneous in the particulars hereinbefore specified as well as others and ought to be reviewed and reversed by the Supreme Court of the United States, and he prayed the said circuit court to grant him an appeal therefrom accordingly, but it refused to do so. (See Record, p. 149.) Said decree directs that unless the balance remaining due on the interest coupons which matured on the 1st day of January, 1889, amounting to $25,680, and the interest coupons which matured on the 1st day of July, 1889, amounting to $34,800, should be paid within thirty (30) days from the date of said decree, then the said property should be sold as hereinbefore stated. (See Record, p. 146.)

Your petitioner therefore prays that an appeal from and supersedeas to the said decree of the said circuit court of the United States for the southern district of Ohio, passed in said cause on the 5th day of December, 1889, may be granted him; and, as in duty bound, will ever pray, &c.

ERWIN DAVIS,
By C. C. COLE,
W. L. COLE,
Attorneys.

354 This petition was presented to me this January 31, 1890. The further hearing of the application is postponed and set for hearing before the circuit justice of the sixth circuit, in Washington, on the 7th day of February, 1890, of which hearing the petitioner must give due notice to the attorneys of the original plaintiff, The Mercantile Trust Company, and the defendant, The Kanawha and Ohio Railway Company.

January 31, 1890.

JOHN M. HARLAN,
Circuit Jus.

This application was heard by me at chambers, in the city of Washington, on the 7th day of February, 1890, the petitioner, Er-

win Davis, and the Mercantile Trust Company being present by counsel. The counsel of the Kanawha and Ohio Railway Company were duly notified of this hearing, but did not attend. I am of opinion that the order of November 13, 1889, permitting Erwin Davis to intervene and giving him liberty to be heard upon any and all proceedings in this cause for the protection of his interests as bondholder and stockholder of the Kanawha and Ohio Railroad Company, and the order of December 5, 1889, showing the filing by Davis with leave of the court of his intervening petition, had the affect to make him a party to the cause, with the right of appeal from the decree of December 5, 1889. That right I am bound to recognize. The prayer for an appeal by Davis is therefore granted, and the appeal is allowed; but, in view of all the circumstances, especially the nature of the property involved, the questions arising upon Davis's appeal should be determined at an early day. If the petitioner, Davis, will, on or before Feb. 26, 1890, execute a written stipulation in the cause, agreeing to file a complete
355 transcript of the record in the clerk's office of the Supreme Court of the United States, with proper bond for costs, on or before the first day of May next, and consenting to a submission of the case upon briefs under the rules of that court, on or before November 1, 1880, I will approve a bond, with sufficient surety, on the penalty of one hundred and twenty-five thousand dollars, to operate as a supersedeas. If he does not, within the time above fixed, accept those terms, then the appeal allowed shall operate as a supersedeas only upon his executing bond, to be approved by me and conditioned as required by law, in the penalty of three hundred thousand dollars.

This February 11, 1890.

JOHN M. HARLAN,
Circuit Justice, Assigned to the 6th Circuit.

And afterwards, to wit, on the 1st day of March, A. D. 1890, the following notice was filed in the clerk's office of said court, clothed in words and figures following, to wit:.

Notice.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee,
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY. } In Equity. No. 479.

GENTLEMEN: You are hereby notified that on Friday, the 31st day of January, 1890, a petition was presented by Erwin
356 Davis to the *to the* Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, praying an appeal from and supersedeas to the decree passed in the above cause on the

5th day of December, 1889, whereupon the said justice, by an order endorsed on said petition, postponed the further hearing of said application and set the same for hearing before the circuit justice of the sixth circuit, in Washington, on the 7th day of February, 1890, of which hearing he required the petitioner to give notice to the attorneys of the original plaintiff, as well as the attorneys of the defendant.

You will therefore take notice that on Friday next, the 7th day of February, 1890, a hearing of said application for an appeal and supersedeas will be had before the circuit justice of the 6th circuit, in chambers, of the Supreme Court of the United States, in the city of Washington, D. C.

J. B. JACKSON,
Solicitor for Erwin Davis, Parkersburgh, W. Va.

Jan'y 31, '90.

To Alexander & Green, & Simpson, Thatcher & Barnum, & Kenna & Chalum, solicitors for the plaintiffs, The Mercantile Trust Co.; Knight & Couch, solicitors for the defendant The Kanawha & Ohio Railway Co.

357 WEST VIRGINIA, }
Wood County, } *ss:*

Before me, a notary public in and for Wood county, came J. B. Jackson, who, being duly sworn, on oath says that he, on Feb. 3, 1890, mailed to Alexander & Green and Simpson, Thatcher and Barnum, each postpaid, a copy of the within notice, addressed to their respective firms in New York city; also to Knight & Couch a copy of the same postpaid, addressed to them — Charleston, West Virginia.

J. B. JACKSON.

Taken, sworn, and subscribed before me this 3rd day of February, 1890.

W. W. JACKSON,
Notary Public, Wood Co., W. Va. [SEAL.]

And afterwards, to wit, on the 1st day of March, A. D. 1890, an order was made upon the order book of said court, clothed in the words and figures following, to wit:

Order Book A, p. 116.

This application was heard by me, at chambers, in the city of Washington, on the 7th day of February, 1890, the petitioner, Erwin Davis, and the Mercantile Trust Company being present by counsel. The counsel of the Kanawha and Ohio Railroad Company were duly notified of this hearing, but did not attend. I am of the opinion that the order of November 13, 1889, permitting Erwin Davis to intervene and giving him liberty to be heard upon any and all proceedings in this cause for the protection of his interests as bondholder

and stockholder of the Kanawha and Ohio Railroad Com-
358 pany, and the order of December 5, 1889, showing the filing by Davis, with leave of the court, of his intervening petition, had the effect to make him a party to the cause, with the right of appeal from the decree of December 5, 1889. That right I am bound to recognize. The prayer for an appeal by Davis is therefore granted and the appeal is allowed. But in view of all the circumstances, especially the nature of the property involved, the questions arising upon Davis' appeal should be determined at an early day. If the petitioner, Davis, will, on or before February 26th, 1890, execute a written stipulation in the cause, agreeing to file a complete transcript of the record in the clerk's office of the Supreme Court of the United States, with proper bond for costs, on or before the first day of May next, and consenting to a submission of the case upon briefs under the rules of that court on or before November 1, 1890, I will approve a bond with sufficient surety in the penalty of one hundred and twenty-five thousand dollars to operate as a supersedeas. If he does not, within the time above fixed, accept these terms, then the appeal allowed shall operate as a supersedeas only upon his executing bond, to be approved by me and conditioned as required by law, in the penalty of three hundred thousand dollars.

This February 11th, 1890.

JOHN M. HARLAN,
Circuit Justice, Assigned to the 6th Circuit.

359 And afterwards, to wit, on the 1st day of March, A. D. 1890, the following appeal bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY and Others.

Know all men by these presents that we, Erwin Davis and Eugene R. Leland, are held and firmly bound unto the above-named The Mercantile Trust Company, its successors and assigns, in the sum of five hundred dollars; to the payment of which we and each of us bind ourselves jointly and severally, and *one* and each of our heirs, executors, and administrators.

Sealed with our seals and dated the 26th day of February, 1890.

Whereas the above-bound Erwin Davis has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit on the 5th day of December, 1889, by the said circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is that if the above-named Erwin Davis shall prosecute his said appeal to effect and if he fail to make his plea good answer all costs, then this

obligation to be void; otherwise tohe same shall be and remain in full force and virtue.

ERWIN DAVIS. [SEAL.]
EUGENE R. LELAND.

360 Sealed and delivered in presence of—
JOHN A. SHIELDS.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Eugene R. Leland, of No. 61 West 104th street, in the city of New York, being duly sworn, doth depose and say that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

EUGENE LELAND.

Sworn to this 26th day of Feb., 1890.
JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

On this 26th day of February, A. D. 1890, personally appeared before me Erwin Davis and Eugene R. Leland, the persons described in and who executed the foregoing bond and known to me to be the same persons therein described, and severally acknowledged before me that they executed the same for the purpose therein set forth.

And I do further certify that the said surety, Eugene R. Leland, is good and sufficient for the amount stated in the foregoing bond.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for Southern Dist. of N. Y.

361 Bond approved this Feb. 27, 1890.
JOHN M. HARLAN,
Justice Sup. C't U. S., Assigned to 6th Circuit.

And afterwards, to wit, on the 12 —, the following citation was issued by Justice Harlan; said citation is clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Mercantile Trust Company, the Kanawha and Ohio Railway Company, the Toledo and Ohio Central Railway Company, and the Shawnee and Muskingum River Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of October next, pursuant to an order allowing an appeal filed in the clerk's office of the circuit court of the United States for the southern district of Ohio on the petition of Erwin Davis, wherein the said Erwin Davis is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said The Kanawha and Ohio Railway Company mentioned in the said petition and order allowing said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

362 Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 27th day of February, in the year of our Lord one thousand eight hundred and ninety.

JOHN M. HARLAN,
Justice Sup. C't U. S., Assigned to 6th Circuit.

(Endorsed.)

On this fourth day of March, in the year of our Lord one thousand eight hundred and ninety, personally appeared William S. Dresbeck before me, the subscriber, and *makes* oath that he delivered a true copy of the within citation to John W. Simpson, solicitor for the Mercantile Trust Company; C. S. Morgan, general agent of the Toledo and Ohio Central Railroad Co., and to E. C. Winstanley, president of the Shawnee and Muskingum River Railway Co.; the Kanawha and Ohio R'y Co. not *ou*fnd in my jurisdiction.

W. S. DRESBACK,
Deputy U. S. Marshal.

Sworn to and subscribed before me this tenth day of March, A. D. 1890.

C. P. WHITE,
Deputy Clerk U. S. Court, E. D., S. D. O. [SEAL.]

Fees, total amount, $11.90.

WM. S. DRESBACK,
Deputy U. S. M.

363 And afterwards, to wit, on the 7th day of March, A. D. 1890, the following appearanee was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appearance of Erwin Davis.

Circuit Court of the U. S., Southern Dist. of Ohio, E. D.

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA & OHIO R'Y CO.

Erwin Davis now appears by his counsel and gives notice of opposition to the confirmation of sale and requests that he be notified

seasonably of the time and place of any application for the confirmation of said sale.

HARMON, COLSTON, GOLDSMITH & HOADLEY, *Solicitors.*

And afterwards, to wit, on the same day, there was filed in the clerk's office of said court the following printer's bill. Said bill is clothed in the words and figures following, to wit:

363½ *Printer's Bill.*

All bills due at the close of each month.

S. J. Flickenger, manager.

Estimates on time advertisements, mercantile, railroad, bank, insurance, legal, and other printing furnished on application.

COLUMBUS, O., *March* 5, 1890.

P. W. Huntington, special commissioner, Mercantile Trust Co., K. & O. R'y,

To the Ohio State Journal, Dr.

Book, job, and newspaper printing house, No. 47 East State street.

Date.	Memoranda.	Space.	Order.	Time.	Kind.		
Jan'y 15..	Adv.....	68 Al.	1 taw.	8 t.	Disp...	29 92	
Feb'y 22..	100 slips.....	.....	.....	.....	.....	50	
							30 42

364 And afterwards, to wit, on the 19th day of March, A. D. 1890, the following report of sale was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Report of Sale of Special Master P. W. Huntington.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant, *against* THE KANAWHA AND OHIO RAILWAY COMPANY and Others, Defen-ants.

The undersigned, appointed commissioner in and by the decree of this court in this cause made on the 5th day of December, 1889, respectfully reports as follows:

Pursuant to the terms of said decree and under the direction contained in the order made by this court in said cause on the 11th day of January, 1890, I fixed Tuesday, the 4th day of March, A. D. 1890, at 12 o'clock noon, as the time of the sale to be made under said decree, and gave public notice of the time and place of such sale by publication in the Daily Kanawha Gazette, a newspaper of general circulation published in the city of Charleston, in the State

of West Virginia, and in the Ohio State Journal, a newspaper of general circulation published in the city of Columbus, in the State of Ohio, and in the New York Daily Tribune, a newspaper of general circulation published in the city of New York and the
365 State of New York, such publication beginning in each of said papers more than 45 days prior to the time of sale, to wit, in the Daily Kanawha Gazette on the 15th day of January, 1890, and in the Ohio State Journal on the 15th day of January, 1890, and in the New York Daily Tribune on the 15th day of January, 1890, and being repeated weekly in each of said newspapers until the sale, all of which will more fully appear by the affidavits attached hereto, embodying copies of the notices published as aforesaid.

And on the said 4th day of March, 1890, at 12 o'clock noon, at the front door of the court-house of the U. S. court, in the city of Columbus, in the southern district of Ohio, eastern division, I offered for sale, at public auction, all the property, rights, and franchises in said decree directed to be sold, including the bonds and stock of the Point Pleasant — therein mentioned, and at the same time announced the terms and conditions of sale as provided in said decree.

And thereupon came Nelson Robinson and Wm. B. Post, of New York, and bid the sum of five hundred and five thousand dollars for all said property, rights, and franchises bonds and stock, and after diligent effort to obtain a higher and better bid for said property, rights, and franchises, bonds and stock, no higher or better bid being received, I publicly sold and struck off the same to the said Nelson Robinson and W. B. Post for the said sum of five hundred and five thousand dollars, the same being the highest and best bid obtained therefor, and, prior to the acceptance by me of the bid made by said Robinson and Post, said Robinson and Post deposited with me, by certificate on a responsible bank, the sum of fifty thousand dollars, and said sum I have paid over into the
366 registry of this court, as appears by the receipt of the clerk of this court hereto attached.

I respectfully recommend that the sale herein reported be in all respects confirmed and approved by this court.

And I further report that the expenses incurred by me in the premises amount to —— and one hundred and twenty-six and $\frac{37}{100}$ dollars, the details whereof are shown in the statement of expenses attached hereto.

P. W. HUNTINGTON,
Special Commissioner.

Columbus, O., March 19, 1890.

Statement of Expenses.

Publication of notice of sale in the Kanawha Gazette.....	$23 95
" " " Ohio State Journal.....	30 42
" " " N. Y. Daily Tribune....	72 00
	$126 37

367 GAZETTE OFFICE,
CHARLESTON, WEST VA., *March* 17, 1890.

I, Moses W. Donnelly, editor of the Daily Kanawha Gazette, a newspaper published in Kanawha county, State of West Va., hereby cert-y that the annexed notice was published in said Gazette for 42 successive times, commencing January 15, 1890, being every day from January 15, 1890, to March 4, 1890, Mondays only excepted (no paper being published on Mondays), and that the same was posted at the front door of the court-house of Kanawha county more than 46 days before the date of said sale, to wit, March 4, 1890.

MOSES W. DONNELLY.

Sworn and subscribed before me this 17th day of March, 1890.
GEORSE S. COUCH,
Notary Public, Kanawha County, West Va.

Printer's fee, $23.95.

368 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee, Complainants,
against
THE KANAWHA & OHIO RAILWAY COMPANY and Others, Defendants. } In Equity.

Pursuant to the decree of sale made in the above-entitled cause on December 5th, 1889, and the order therein made on January 11th, 1890, I shall offer for sale at public auction, at the front door of the court-house of the U. S. court, in the city of Columbus, in the southern district of Ohio, eastern division, on the fourth day of March, A. D. 1890, at twelve o'clock noon, all the property, rights and franchises, and bonds and stock by said decree directed to be sold, to wit:

The railroad of the said The Kanawha and Ohio Railway Company and all its property, rights, and franchise*d* connected with or used for the purposes of said railroad or any part thereof, including rolling stock and interests in rolling stock, contracts and leases, and rights under contracts and leases, and including all its rights, title, and interest of, in, or to the railway bridge across the Ohio river at Point Pleasant and the railway and other property appurtenant thereto; also bonds of the Point Pleasant Bridge Company for the principal sum in the aggregate of one million dollars, secured by a mortgage of the said bridge company to John W. Simpson,
369 as *as* trustee, and stock of the said bridge company of the par value of nine hundred and ninety-eight thousand dollars; and for a more full enumeration and description of the property, rights and franchises, bonds, and stock so to be offered for sale I refer to said decree in this cause entered Dec. 5th, 1889.

All said railroad, property, rights and franchises, and said bonds

and stock of said bridge company are to be sold together as an entirety and free from redemption, but subject, as to a portion of said railroad, to the mortgages known as the Mineral Division mortgages of the Ohio Central Railroad Company, mentioned in the amended bill in said cause. No bid will be accepted at such sale unless the bidder shall deposit with me, in money or by certificate of some responsible bank, the sum of fifty thousand dollars, subject to the provisions of said decree of sale.

Dated January 13th, 1890.

P. W. HUNTINGTON,
Special Commissioner.

ALEXANDER & GREEN,
SIMPSON, THATCHER & BARNUM,
Solicitors for Complainants.

370 STATE OF OHIO, } ss:
Franklin County, }

Claude K. Seibert, being duly sworn, says he is the book-keeper for the Ohio State Journal, a newspaper published at Columbus, Franklin county, Ohio, and of general circulation therein; that the advertisement hereto annexed has been regularly published in the said Ohio State Journal once a week for seven weeks consecutively, commencing on the 15th day of January, 1890, to wit, on January 15th, January 22, January 29, Feb. 5th, Feb. 12th, Feb. 19th, and Feb. 26th, 1890, and also one time on March 3rd, 1890.

CLAUDE K. SIEBERT.

Sworn to before me and subscribed in my presence this 5th day of March, 1890.

GEO. B. HISCHE,
Notary Public, Franklin County, Ohio. [SEAL.]

371 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee, Complainants,
aganist
THE KANAWHA AND OHIO RAILWAY COMPANY and Others, Defendants. } In Equity.

Pursuant to the decree of sale made in the above-entitled cause on December 5th, 1889, and the order therein made on January 11th, 1890, I shall offer for sale at public auction, at the front door of the court-house of the U. S. court, in the city of Columbus, in the southern district of Ohio, eastern division, on the fourth day of March, A. D. 1890, at twelve o'clock noon, all the property, rights and franchises, and bonds and stock by said decree directed to be sold, to wit:

The railroad of the said The Kanawha and Ohio Railway Company and all its property, rights, and franchises connected with or

used for the purposes of said railroad or any part thereof, including rolling stock and interests in rolling stock, contracts and leases, and rights under contracts and leases, and including all its rights, title, and interest of, in, or to the railway bridge across the Ohio river at Point Pleasant and the railway and other property appurtenant thereto; also bonds of the Point Pleasant Bridge Company for the principal sum in the aggregate of one million dollars, secured by a mortgage of the said bridge company to John W. Simpson,
372 as *as* trustee, and stock of the said bridge company of the par value of nine hundred and ninety-eight thousand dollars; and for a more full enumeration and description of the property, rights and franchises, bonds, and stock so to be offered for sale I refer to said decree in this cause entered Dec. 5th, 1889.

All said railroad, property, rights and franchises, and said bonds and stock of said bridge company are to be sold together as an entirety and free from redemption, but subject, as to a portion of said railroad, to the mortgages known as the Mineral Division mortgages of the Ohio Central Railroad Company, mentioned in the amended bill in said cause. No bid will be accepted at such sale unless the bidder shall deposit with me, in money or by certificate of some responsible bank, the sum of fifty thousand dollars, subject to the provisions of said decree of sale.

Dated January 13th, 1890.

P. W. HUNTINGTON,
Special Commissioner.

ALEXANDER & GREEN,
SIMPSON, THATCHER & BARNUM,
Solicitors for Complainants.

373 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

James G. Cooper, being duly sworn, saith that he is the principal clerk of the publishers of the New York Daily Tribune, a newspaper published in the city of New York by the Tribune Publishing Association; that the advertisement hereto annexed has been regularly published in the New York Daily Tribune once a week for seven weeks consecutively, commencing on the 15th day of January, 1890, to wit, on January 15th, Jan. 22, Jan. 29, Feb. 5th, Feb. 12, Feb. 19, and Feb. 26th, 1890, and also one time on March 3rd, 1890.

JAS. G. COOPER.

Sworn to before me this 12th day of March, 1890.

WM. BARKER,
[SEAL.] *Notary Public, N. Y. Co.*

374 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee, Complainants,
against
THE KANAWHA AND OHIO RAILWAY COMPANY and Others, Defendants.
} In Equity.

Pursuant to the decree of sale made in the above-entitled cause on December 5th, 1889, and the order therein made on January 11th, 1890, I shall offer for sale at public auction, at the front door of the court-house of the U. S. court, in the city of Columbus, in the southern district of Ohio, eastern division, on the fourth day of March, A. D. 1890, at twelve o'clock noon, all the property, rights and franchises, and bonds and stock by said decree directed to be sold, to wit:

The railroad of the said The Kanawha and Ohio Railway Company and all its property, rights, and franchises connected with or used for the purposes of said railroad or any part thereof, including rolling stock and interests in rolling stock, contracts and leases, and rights under contracts and leases, and including all its rights, title, and interest of, in, or to the railway bridge across the Ohio river at Point Pleasant and the railway and other property appurtenant thereto; also bonds of the Point Pleasant Bridge Company for the principal sum in the aggregate of one million dollars, secured by a mortgage of the said bridge company to John W. Simpson,
375 as *as* trustee, and stock of the said bridge company of the par value of nine hundred and ninety-eight thousand dollars; and for a more full enumeration and description of the property, rights and franchises, bonds and stock so to be offered for sale I refer to said decree in this cause entered Dec. 5th, 1889.

All said railroad, property, rights and franchises, and said bonds and stock of said bridge company are to be sold together as an entirety and free from redemption, but subject, as to a portion of said railroad, to the mortgages known as the Mineral Division mortgages of the Ohio Central Railroad Company, mentioned in the amended bill in said cause. No bid will be accepted at such sale unless the bidder shall deposit with me, in money or by certificate of some responsible bank, the sum of fifty thousand dollars, subject to the provisions of said decree of sale.

Dated January 13th, 1890.

P. W. HUNTINGTON,
Special Commissioner.

ALEXANDER & GREEN,
SIMPSON, THATCHER & BARNUM,
Solicitors for Complainants.

376 Circuit Court of the U. S., Southern District of Ohio, Eastern Division. B. R. Cowen, Clerk, C. P. White, Deputy.

THE MERCANTILE TRUST CO.
vs.
THE KANAWHA AND OHIO R'Y CO.

COLUMBUS, O., *M'ch 4th*, 1890.

Received of P. W. Huntington, special commissioner, a certified check on the Manhatten Co. (No. 6339), signed by Homans & Co., to the order of Nelson Robinson and by said Robinson endorsed, for the sum of fifty thousand ($50,000.00) dollars, the same being for advanced payment on sale of property this day made by said Huntington in the above-stated case.

B. R. COWEN, *Clerk.*

And afterwards, to wit, on the 22nd day of March, A. D. 1890, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the U. S., Southern Dist. of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee,
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY and Others.

377 P. W. Huntington, commissioner appointed herein to make sale as provided in the decree entered Dec. 5, 1889, having filed herein his report of sale, the complainant moves that said report and the doings therein reported *and the doings therein reported* be approved and confirmed, and that the court make such further order or decree as may be proper in the premises.

ALEXANDER & GREEN,
SIMPSON, THATCHER & BARNUM,
Solicitors for Complainant.

I fix the 5th day of April, 1890, at 9½ o'clock a. m., as the time and the United States circuit court in Cincinnati, Ohio, as the place for the hearing of the above motion.

GEO. R. SAGE,
U. S. District Judge.

Dated March 22, 1890.

(Endorsed.)

THE UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

I hereby certify that I mailed a copy of this notice at the P. O. at Cincinnati, O., enclosed in an envelope and addressed to Hon. J. B. Jackson, Parkersburgh, W. Va., and had the letter registered. The receipt thereof I herewith attach.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

378 Registered { Letter. / Parcel. } No. 12777. P. O., Cincinnati, O.

Received, Mar. 22, 1890, of B. R. Cowen, clerk U. S. court, a letter (parcel) addressed to Hon. J. B. Jackson, Parkersburgh, W. Va.

J. C. RILEY, *P. M.*,
Per M.

379 *Affidavit of Nelson Robinson.*

And afterwards, to wit, on the 7th day of April, A. D. 1890, the following affidavit of Nelson Robinson was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee, Complainant,
against
THE KANAWHA & OHIO RAILWAY COMPANY and Others, Defendants.

SOUTHERN DISTRICT OF NEW YORK, *City and County of New York*, } ss:

Nelson Robinson, of lawful a-e, being duly sworn, says:

With William B. Post I purchased the Kanawha and Ohio railway and the other mortgaged property at the sale held in pursuance of the decree entered in this suit Decem-er 5, 1889. Mr. Post and myself are both members of the firm of Homans & Co., No. 2 Wall street, New York.

The defendant The Kanawha and Ohio Railway Company has outstanding stock to the amount of $12,200,000, par, viz., first preferred, $6,000,000; second preferred, $4,000,000; common, $2,200,000.

Besides the Mineral Division bonds, which are prior to the mortgage herein, the equipment trust bonds and the indebtedness of the receiver, for which certificates have been authorized, the
379½ indebtedness of the company is approximately as follows:

(1) First-mortgage bonds, principal	$1,160,000
(2) Interest thereon to April 1st, 1890	111,680
(3) Kanawha Improvement Company's judgment, with interest, about	300,000
(4) Notes secured by mortgage on McCullough farm, with interest, about	12,350
(5) Notes secured by mortgage on coal lands, interest to April 1st, 1890	20,925
(6) Miscellaneous accounts, about	20,000

The improvement company owns about 65,000 shares of the said railway company's stock, of which 36,000 shares are first preferred.

Soon after the decree of sale Homans & Co., then owning or rep-

resenting many of said bonds and coupons and items 3 and 4 and part of item 6 in the above statement and all receiver's certificates which had then been issued, informed all bondholders whom they could reach, including the intervening petition-, Erwin Davis, of their purpose to bid at the sale, and offered to all the opportunity to share in the purchase if made by them upon the terms shown in the annexed echibit. Before the day of sale the holders of 950 bonds, including those owned by themselves as aforesaid, accepted the offer and deposited their bonds with the Central Trust Company of New York, subject to the order of Homans & Co., to be used in the purchase and subsequent reorganization.

Immediately after the sale Homans & Co. issued a circular,
380 a copy of which is hereto attached and made part hereof, setting forth a plan of reorganization and offering to all stockholders equally without discrimination the right to participate in the benefits of the purchase. No profit or benefit or advantage in respect to the purchase is reserved or provided for moself to Mr. Post or -omans & Co. All persons in the same interest are treated alike, bearing the same burdens and receiving the same benefits.

Every effort has been used to make known the offer to bondholder- of the offer expressed in this circular to every bondholder and stockholder of the defendant railway company. The right to participate in the purchase and reorganization upon the terms of this circular is still open to every stockholder and every bondholder of the said railway company. All have been invited to participate, and none have been refused the privilege.

Since the s-le additional bonds have been deposited in the Central Trust Company, subject to the order of Homans & Co., under their plan of reorganization, and now the total amount so deposited is one thousand and sixty-nine bonds, including substantially all unpaid coupons pertaining thereto.

Among these are seventy bonds deposited on April 2nd by the intervening petitioner, Erwin Davis, who has assured me that he would also deposit the remainder of his bonds.

Since issuing the circular of reorganization aforesaid Homans & Co. have signed an agreement with the Chesapeake & Ohio Railway Company providing for the lease to the latter of the railroad of the reorganized company for the term of 99 years, and by the terms of which the Chesapeake & Ohio Railway Company
381 will guarantee the payment of interest upon all the bonds of the reorganized company.

This agreement, which was begun and completed since March 4th last, has added greatly to the value of the mortgaged railway and other property purchased as aforesaid. The terms of the agreement have been made known to the bond and stock holders of the defendant railway company, and, so far as I know, have met with the approval of all.

The intervening petitioner, Erwin Davis, in particular, has in my presence and hearing repeatedly expressed his satisfaction therewith and the opinion that it will result in great advantage to the bond and stock holders of the reorganized company.

I am not and since March, 1888, have not been an officer or director either of the Kanawha and Ohio Railway Company or of the Kanawha Improvement Company.

NELSON ROBINSON.

Sworn to before me this third day of April, 1890.

PHILIP G. BARTLETT,
Notary Public, New York County. [SEAL.]

382 NEW YORK, *March* 20, 1890.

To the holders of stock of the Kanawha and Ohio Railway Company or of stock of the Kanawha Improvement Company:

We have purchased the property and franchises of the Kanawha and Ohio Railway Company which were sold on the 4th inst. by decree of the United States circuit court for the southern district of Ohio, eastern division, in the suit of the Mercantile Trust Co. to foreclose said company's first mortgage.

The holders of more than 960 out of 1,160 in all of the railway company's first-mortgage bonds have already agreed to join in the reorganization which is to result from said purchase, and we now offer to the stockholders of said railway company, and also to the stockholders of the Kanawha Improvement Company, who, by agreement with their directors, are to exercise this privilege in the place of said company *pro rata* according to their holding, the opportunity to participate in such reorganization under the following

Plan of Reorganization.

First. A company is to be organized hereinafter, called the new company, which is to be vested with the title to the property, rights, and franchises of the Kanawha and Ohio Railway Company purchased as aforesaid, and also to the property and franchises of the Charleston and Gauley Railway Company, and to create and issue, as required, the following securities, to wit:

1. Its 100-year gold bonds, of $1,000 each, bearing interest at the rate of 5 per cent. or 4 per cent. per annum, as may be hereafter determined, adjusted from April 1st, 1890, and secured to be paid
383 by said new company's first mortgage or deed of *of* trust upon all its property, rights, and franchises acquired or to be acquired, except the Raleigh county coal lands, including the Point Pleasant bridge or securities representing the same, and which shall contain such provisions for the protection and security of the holders of said bonds as counsel shall advise, but which may be subject to the liens which are prior to the said Kanawha and Ohio Railway Co.'s first mortgage, including the mortgage known as the Mineral Division mortgages of the Ohio Central Railroad Company.

The amount of said bonds is to be limited to $15,000 principal of bonds for each mile of single track of railroad, excluding sidings and switches, covered by said mortgage, and of these bonds the

amount of $10,000 of principal per mile of such railroad now constructed only are to be issued for the purposes of the reorganization. The remaining $5,000 per mile upon railroad now constructed or acquired are to be issued only in the e-ent that the railroad hereafter constructed or acquired *are to be issued only in the event that the railroad now constructed* be extended, and then only for the purpose of constructing or acquiring additional railroad to that now built or for the purpose of equipping with rolling stock the railroad of the new company.

2. Its capital stock to an amount not exceeding $10,000,000, in shares of $100 each, of which, except in the contingency that we exercise the right reserved in paragraph second hereof, there shall be used for the purpose of reorganization only an amount equal to $40,000 par value of stock for each mile of the new company's railroad now constructed, and the amount of which, except in said contingency, at any time outstanding shall not exceed an amount equal to $40,000 par value of stock per mile of railroad actually
384 constructed and belonging to the new company.

Second.

1. Each holder of Kanawha and Ohio first-mortgage bonds, party to the reorganization, is to receive for said bonds, with all unpaid coupons attached, the accrued interest thereon, in case, and an equal number and amount of the new company's first-mortgage bonds, and, in addition thereto, in the event that the rate of interest thereon be made 4 per cent. per annum, not less than thirty per cent. of the principal of his said bonds in stock of the new company at par.

2. Stockholders of the Kanawha and Ohio Railway Company, parties to the reorganization, may purchase stock of the new company at the price of $20 per share to the following amounts, to wit:

Holders of first-preferred stock to the amount of fifty per cent. (50%), holder- of second-preferred stock to the amount of twenty-five per cent. (25%), and holders of common stock to the amount of twelve and one-half per cent. (12½ per cent.) of their respective holdings.

Stockholders of the Kanawha Improvement Company, parties to the reorganization, may purchase stock of the new company at the price of $20 per share to the amount of two hundred and fifty per cent. (250) of their holdings.

In other words, stockholders of the Kanawha and Ohio Railway Company paying $10 per share upon their first-preferred, $5 per share upon their second-preferred, and $2.50 per share upon their common stock, and stockholders of the Kanawha Improvement Company paying $50 per share upon their improvement stock, will receive for such payments stock of the new company at $20 per share.

385 The funds thus obtained are to be used, so far as required, for the purposes of the reorganization.

We, however, reserved the right to deliver to the stockholders who become parties to the reorganization stock of the new company

at $10 per share instead of at $20 as aforesaid, and, in such case, $9,000,000 par value of the new company's stock may be used for the purposes of reorganization, and the remaining $1,000,000 is to be held for and turned over to the new company, unless, before the reorganization shall have been concluded, we otherwise use or dispose of the same in the common interest and for the common benefit for the parties thereto, which we reserve the right to do if it shall appear desirable.

3. The debts and obligations of the Kanawha and Ohio railway other than its first-mortgage bonds, and also those of the Charleston and Gauley Railway Co., and those of the Kanawha Improvement Company, and all liens upon the property of either are in our discreation to be paid, acquired, or settled or so dealt with that they will not interfere with the new company's enjoyment and possession of said railroad.

Third. As soon after acquired, the Charleston and Gauley Railway Company, or securities representing the same, as we or, after their election, the directors of the new company deem it expedient, the said railroad is to be extended to the mouth of the Gauley river or to a connection with the Chesapeake and Ohio at Kanawha Falls.

Fourth. We reserve full discretion in respect to all questions arising under this plan or pertaining to said reorganization, with full power to do whatever we may deem necessary or expedient
386 to effect the same and the purposes thereof, as shown herein, and to use for such purposes, including all expenses thereof, the money contributed under this plan and so much stock and so many bonds of the new company appropriated for these purposes as shall appear to be requisite and advisable. Until the new company, by its board of directors, shall have taken possession of the railroad and property in question we reserve the right and power to manage the same and to lease or sell the whole or *in* part of said railroad or property upon such terms as we consider advantageous for the parties to the reorganization.

Fifth. Stock, whose holders wish to share in said reorganization, must be deposited, with the annexed instrument duly executed, on or before April 7th, A. D. 1890, with the Central Trust Company of New York, transferred to us and subject to our order. Negotiable receipts therefor will be issued by the trust Co., entitling each holder thereof who performs the agreed conditions to receive, when ready for delivery, stock of the new company, in accordance with this plan.

The money required by paragraph second hereof mus*h* be paid into the said trust company to our order as follows: 50 per cent. at the time of depositing the stock; the remainder when the new stock is ready for delivery.

Sixth. All bonds, stock, and cash in our hands for the purposes of reorganization, but not used by us therefor, and also the bonds and stock of the Kanawha and Ohio Railway Company acquired hereunder after reorganization shall have been completed, and all debts and liabilities incurred in connection therewith shall have

been paid or discharged *oer* to be transferred to or held for the benefit of the new company, under appropriate agreements for our protection and indemnity.

387 Seventh. The agreements heretofore made with the Toledo and Ohio Central Railroad Company and with the Shawnee and Muskingum River Railway Company affecting the Buckingham branch and a part of the Kanawha and Ohio railway extending south from Corning are to be carried out in good faith as among the purposes of the reorganization.

The Kanawha and Ohio property consists of 127 miles of railway, including valuable terminals at Charleston, securities representing the Point Pleasant bridge, 14 locomotives, 526 cars, 10,000 acres of coal land in Raleigh county, and the McCullough farm. The property of the Charleston and Gauley Railroad Company consists of 7 miles of railroad, 20 acres of valuable land in or near Charleston, and nearly 53 miles of right of way, including nearly the entire distance to the mouth of Gauley river.

The Charleston and Gauley will be acquired at the cost thereof, with interest as agreed, all bills pretaining to the construction thereof to be approved, so far as this has not already been done, by the engineer of the Kanawha and Ohio or the new company.

The plan of reorganization, if duly carried into effect, will furnish for the purposes of reorganization $855,000 in cash, and will require for these purposes of the new company's first-mortgage bonds, including those set apart to retire Mineral Division bonds, not more than $1,340,000, being $10,000 per mile on 134 miles of railroad, and of the new company's stock for distribution among bondholders $348,000, and for distribution among stockholders or other purchasers $4,275,000. In addition, $737,000 per value of stock may be used if actually necessary to effect all the pur-

388 poses of the reorganization, making a total of $5,360,000 of stock, being at the rate of $40,000 per mile on 134 miles of railroad. Assuming these amounts to be sufficient for all the purposes in question, the new company's capitalization in respect to the railroad now constructed would be, first-mortgage bonds, $1,340,000; stock, not exceeding $5,360.000, and it is proposed that the amount of either bonds or stock outstanding shall be increased only in accordance with the provisions of the plan hereinbefore set forth.

It is understood, however, that the amount of stock to be issued may be increased to the amount and in the manner and for the purposes explained in paragraph second of the plan.

It is especially desirable that all stockholders who desire to avail themselves of our offer should do so promptly.

(Signed) HOMANS & CO.

To Messrs. Homans & Co., No. 2 Wall street, New York:

In consideration of your offer and agreements expressed in the foregoing circular and in accordance with the plan of reorganization therein set forth — do hereby transfer and assign to you and deposit subject to your order — shares first-preferred stock, — shares

second-preferred stock, and — shares common stock of the Kanawha and Ohio Railway Company, and hereby agree to pay, as provided by said plan, the amount required thereby on account of the stock so deposited, viz., the sum of — dollars, and to accept therefor stock of the new company as provided in said plan.

389 Dated March —, 1890.

—— ——.

Signed and delivered in the presence of—

—— ——.

Endorsement on back: Kanawha & Ohio Railway Company. Reorganization circular of Homans & Co., dated March 20th, 1890, to stockholders of Kanawha and Ohio Railway Company. —— shares 1st preferred, —— shares 2d preferred, —— shares common. —— ——.

390 And afterwards, to wit, on the 7th day of April, A. D. 1890, the following affidavit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Affidavit of Erwin Davis.

United States Circuit Court, S. D. O.

THE MERCANTILE TRUST COMPANY OF NEW YORK
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY and ERWIN DAVIS.

SOUTHERN DISTRICT OF NEW YORK, *City and County of New York*, } ss:

Erwin Davis, being duly sworn, deposes and says that he is one of the above-named defendants.

That in the order or decree in the above-entitled cause under which the master or commissioner appointed by this court was empowered to make a sale in foreclosure of the premises and property involved in said action said master or commissioner was further authorized and empowered to proceed with said sale and to make adjournments thereof from time to time without giving to deponent or to any other parties interested in such sale or in said property any notice whatsoever of such sale or of such adjournments thereof; that the property in question was in fact sold by such master or commissioner under said decree in this cause on a day prescribed without any notice to this deponent, and that by reason of the uncertainty as to the time of such sale, owing to the provision contained in the order or decree appointing such master or com-

391 missioner by which he was enabled to make and adjourn such sale from time to time without notice, and owing to deponent's continuous and pressing business engagements, which absolutely prevented him from personally watching said sale, and the

action of said master or commissioner in respect thereto, it became impossible for deponent to keep himself informed as to such sale.

And deponent further says that the property in question was sold by said commissioner or master at said sale as aforesaid for a wholly inadequate price, and that said property was worth much more than was in fact obtained for the same upon said sale, and that a much higher price might and could have been obtained for said property had any notice of such sale been given by said master or commissioner to parties interested therein, and particularly to this deponent.

That deponent is now and was at the time of such sale willing and hereby offers to pay ten per cent. more upon the purchase price of said property than was in fact paid and obtained for said property upon such sale thereof by said master or commissioner as aforesaid, and that deponent will pay and hereby offers to pay upon any resale of said property which may be ordered by the court in the above-entitled cause such additional ten per cent. over and above the price in fact obtained therefor upon such sale as aforesaid.

And further deponent saith not.

ERWIN DAVIS.

Subscribed and sworn to before me this third day of April, 1890.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

GEO. H. COREY,

[SEAL.] *Commissioner for the State of Ohio in New York; Office, 52 Wall Street, N. Y.*

392 And afterwards, to wit, on the same day, there was filed in the clerk's office of said court the following offer of Erwin Davis. Said offer is clothed in the words and figures following, to wit:

Offer of Erwin Davis.

U. S. Circuit Court, S. D. O.

THE MERCANTILE TRUST CO. OF NEW YORK
vs.
THE KANAWHA AND OHIO R'Y CO. and ERWIN DAVIS.

I, Erwin Davis, one of the defendants above named, do hereby offer and agree to pay for the property heretofore sold by the master or commissioner appointed by this court under the decree of foreclosure in the above-entitled cause ten per cent. more than was in fact obtained upon such sale for such property, and should any resale of such property be ordered by the court in the above-entitled case I hereby offer and agree to pay such ten per cent. over and above and in addition to the price actually paid and received for such property upon such sale as aforesaid.

Dated New York, April 3, 1890.

ERWIN DAVIS.

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that on this third day of April, in the year one thousand eight hundred and ninety, before me, the undersigned, George H. Corey, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Ohio to take acknowledgment of deeds, &c., to be used or recorded therein, personally appeared
393 Erwin Davis and acknowledged the signing and sealing of the foregoing instrument to be his act and deed for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

GEO. H. COREY,
[SEAL.] *Commissioner for the State of Ohio.*

Office, 52 Wall street, N. Y.

And afterwards, to wit, on the 7th day of April, A. D. 1890, the following statement was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Statement.

U. S. Circuit Court, S. Dist. of Ohio, E. Div.

MERCANTILE TRUST CO.
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY.

The obligations of the trustee under the trust created by the mortgage are for disbursements and services of counsel in this cause and the allied cause in West Virginia, both being for the enforcement of the trust.

Its counsel have been and are Alexander & Green, of New York; Simpson, Thatcher & Barnum, of New York; Hon. Ashbel Green, of New York; Messrs. Kanna & Chilton, of Charleston, *who* in this cause there have been—
394 Hearing on appointment of receiver.
Hearing at Detroit on receiver's application.
Hearing at Cleveland on another application of receiver.
Hearing at Cincinnati on Davis' application to remove the receiver.
Hearing at Cincinnati on entry of decree of sale.
Hearing at Nashville as to receiver's certificates.
Attendance at sale.
Hearing at Washington as to appeal, &c.
Present hearing.
In West Virginia there have been—
Hearing at Charleston, May, 1889, before Harlan & Jackson, JJ.
Hearing at Washington as to order thereon.
Hearing at White Sulphur Springs before Harlan and Jackson.

Hearing at Washington.

Hearing at Parkersburg before Bond & Jackson, JJ.

The disbursements of counsel amount to about $3,000, so far as heard from.

April 7, 1890.

THATCHER & THATCHER, *Counsel.*

395 And afterwards, to wit, on the same day, there was filed in the clerk's office of said court the following report of receiver; said report is clothed in the words and figures following, to wit:

Report of Receiver.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, Trustee,
against
THE KANAWHA AND OHIO RAILWAY COMPANY and Others.

The undersigned, Robert W. Kelley, the receiver appointed herein, respectfully reports—

That the amount of the receiver's indebtedness, including certificates authorized and issued, does not exceed over and above cash on hand and receivable and is about the sum of one hundred and five thousand dollars ($105,000).

Dated Cincinnati, April 5th, 1890.

ROBERT W. KELLEY.

And afterwards, to wit, on the 7th day of April, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 225.

And now, on this day, this cause came on further to be heard upon the application of the complainant herein, The Mercantile Trust Co., trustee, to confirm the sale made herein on the 4th day of March, 1890, by Pelatial W. Huntington, Esq., commissioner appointed for the purpose in and by the decree of this court herein made the 5th day of December, 1889, to Nelson Robinson and W. B.
396 Post in New York; and the report of said commissioner being examined, and it appearing to the court that sufficient notice of the hearing of this application has been given the solicitors for the parties to this cause, and it appearing to the court from the said report of said commissioner that said sale was conducted and notice thereof was given in accordance with the said decree of sale herein made December 5th, 1889, and the order made herein on the 11th day of January, 1890, and that the amount bid at said sale as reported by said commissioner, to wit, the sum of five hundred and five thousand dollars, was the highest and best bid for the property, rights, and franchises, bonds and stock, ordered to be sold by him—

It is now therefore ordered, adjudged, and decreed that the said sale be, and the same is hereby, ratified, confirmed, and approved, and all proceedings of the said commissioner, as shown by his said report and the exhibits attached thereto, are approved and confirmed.

And it appearing to the court that said purchasers, Nelson Robinson and William B. Post, on account of said purchase price—that is, the sum of five hundred and five thousand dollars bid at said sale—have paid in money, now in the registry of this court, the sum of fifty thousand dollars, and now, as further payment thereof, tender ten hundred and sixty-nine (1,069) of the first-mortgage bonds of the Kanawha and Ohio Railway Company mentioned in said decree of sale, being for the principal sum in the aggregate of one million and sixty-nine thousand dollars ($1,069,000), and all of said bonds having attached thereto the coupons representing interest due thereon July 1st, 1889, and thereafter, except nine thereof which have attached coupons due January 1st, 1890, and
397 thereafter, and in addition also tender seven hundred and sixty-eight (768) coupons of $30 each, representing interest maturing on seven hundred and sixty-eight (768) of said bonds January 1st, 1889, amounting in the aggregate to twenty-three thousand and forty dollars—

It is further ordered that said Pelatiah W. Huntington, commissioner, receive and receipt for said bonds and coupons, and that said coupons representing interest on said bonds maturing January 1st, 1889, be, and are hereby, accepted on account of said purchase price at the face value thereof, and that the remainder of said bonds and coupons be, and hereby are, accepted on account of said *said* purchase price at such price or value as the holders thereof would have been entitled to receive on a distribution of the proceeds of sale in case the entire amount of the purchase price or bid had been paid in money, such price or value not being yet determined but to be determined hereafter in this cause, and that said commissioner hold said bonds and coupons subject to the further order of the court herein to the end that when the distributive share of the proceeds of sale applicable thereon shall have been determined said bonds and coupons, after being properly marked, may be returned to said purchasers or their assigns as the court may direct.

And it appearing to the court that the distributive share of the proceeds of sale applicable on the bonds and coupons not tendered by the said purchasers as aforesaid will in no event exceed the sum of thirty thousand and fifty dollars;

And it appearing to the court from the report of Robert W. Kelley, receiver herein, this day filed, that his indebtedness as receiver, including certificates authorized or issued, will not
398 exceed and is, as nearly as can now be ascertained, the sum of one hundred and five thousand ($105,000) dollars, and that the portion of said purchase price necessary to be paid in cash, in addition to the $50,000 already paid, cannot be precisely ascertained and determined until the receiver's further report shall have been made and his accounts passed upon:

It is ordered, adjudged, and decreed that, in addition to the

$50,000 already paid on account of said purchase price, the said purchasers pay into the registry of this court the further sum of one hundred and two thousand one hundred and forty and $\frac{7}{100}$ dollars in money or in receiver's certificates of indebtedness to be taken at par and accrued interest, and that, upon the payment of said additional sum in money or in receiver's certificates, Pelatiah W. Huntington, commissioner, forthwith make, execute, deliver, and acknowledge for record a deed duly conveying and transferring to the said Nelson Robinson and William B. Post or their assigns, in fee simple, all and singular the property, rights, and franchises and bonds and stock purchased by them as aforesaid, and all the right, title, and interest, at law or in equity, of all the parties to this suit, of, in, or to the same or any part thereof, and the said several parties to this action are hereby forever barred and foreclosed of all equity of redemption of, in, or to the said property, rights, and franchises and bonds and stock, but said conveyance shall be made subject to the payment of any sums which this court may hereafter in this cause direct to be paid in money on account on said purchase price, and that a vendor's lien shall be reserved in said deed upon the property, rights, and franchises thereby conveyed for the security
399 of such payment, with the right to resell on rule the same or any part thereof, if such payment shall not be made within thirty days after the order of this court to that effect.

And it is further ordered, adjudged, and decreed that upon execution and delivery of said deed all the parties to this cause and the receiver appointed herein shall and they are hereby required and directed to surrender and deliver possession of all and singular the property, rights, and franchises aforesaid so sold as aforesaid to the said purchasers or their assigns upon the presentation of the said deed and demand made for such possession.

And it is further ordered, adjudged, and decreed that the complainant herein and the defendant The Kanawha and Ohio Railway Company forthwith execute and deliver to said Nelson Robinson and William B. Post or their assigns a proper deed or deeds of conveyance conveying and transferring to them all the estate, right, title, and interest of each of said companies of, in, or to the property, rights, and franchises sold as aforesaid, including said bonds and stock of the said Point Pleasant Bridge Company, and, further, that the complainant shall deliver to said Nelson Robinson and William B. Post or their assigns all said bonds and stock of said bridge company held by it as shown in the bill of complaint herein.

And it is further ordered and decreed that out of the fifty thousand dollars of said purchase price already paid in money and now in the registry of this court there be paid the costs of this cause as taxed by the clerk of this court, being $963.90, and also the expenses of sale as reported by said commissioner at the sum of one hundred twenty-six and $\frac{37}{100}$ dollars and compensation to said commissioner for his services herein, which is hereby fixed at the sum of
400 one thousand dollars, and also to the complainant the amount of its disbursements made and obligations incurred as such

trustee, including payments and obligations for the services of its solicitors and counsel herein, amounting in the aggregate to the sum of fifteen thousand dollars.

And for this purpose it is ordered that the aggregate amount of said sums other than said taxed costs, to wit, the sum of sixteen thousand one hundred and twenty-six and $\frac{37}{100}$ dollars, be forthwith paid from the registry of this court to said Pelitiah W. Huntington, commissioner, and that he forthwith make such payments and take proper vouchers therefor and report his proceedings, with said vouchers, to this court.

And it is hereby further ordered that the receiver herein, after surrendering possession to said purchasers or their assigns, as hereinbefore ordered, shall with all convenient speed make and file his final report of his doings as receiver in this cause, which report shall show all indebtedness incurred by said receiver and unpaid, and it is hereby referred to B. R. Cowen, who is hereby appointed a commissioner for that purpose, to examine the report of said receiver and all accounts therewith or theretofore filed by him and to ascertain and report to the court the amount of the indebtedness due from said receiver, the report of said commissioner to be made and filed with all convenient speed, and that said taxed costs be forthwith paid out of said fund in court.

It is further ordered, adjudged, and decreed that all questions touching the proceeds of the said sale and the distribution thereof not heretofore or hereby disposed of are reserved, and that any party to this action or the commissioner or the said pur-
401 chasers or either of them may apply to the court for such other or further directions as may be necessary.

And now came Erwin Davis, by his counsel, Edward Colston, Esq., and prayed an appeal from the foregoing decree to the Supreme Court of the United States, which appeal is now allowed in open court, the said Davis to execute a bond for costs in the sum of five hundred dollars, with approved surety; and it is further ordered that said appeal operate as a supersedeas upon the said Davis giving bond, with sureties, to be approved, as required by law, in the sum of three hundred thousand dollars.

402 And afterwards, to wit, on the 20th day of June, A. D. 1890, the following appeal bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appeal Bond.

Circuit Court of the United States, Southern District of Ohio, Eastern Division, *ss:*

THE MERCANTILE TRUST COMPANY, Trustee, Complainant,
vs.
THE KANAWHA AND OHIO RAILWAY COMPANY *et al.*, Defendants.

Know all men by these presents that we, Erwin Davis, as principal, and Eugene R. Leland, of 55 West 27th St., city of New York

State of New York, are held and firmly bound unto the Mercantile Trust Company, trustee, in the sum of five hundred dollars, to be paid to the said The Mercantile Trust Company, trustees, its successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 18th day of June, 1890.

Whereas the above-named Erwin Davis has taken out an appeal to the Supreme Court of the United States of America to reverse the decree of confirmation of sale, &c., rendered in the above-entitled action of the circuit court of the United States
403 for the southern district of Ohio, eastern division, April 7th, 1890:

Now, therefore, the condition of this obligation is such that if the above-named Erwin Davis shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

ERWIN DAVIS. [SEAL.]
EUGENE R. LELAND. [SEAL.]

Sealed and delivered in presence of—
JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States,
Southern District of New York.

The above security is approved.

GEO. R. SAGE,
District Judge of the U. S., S. D. O.,
Sitting and Holding Circuit Court,
There Being no Associate Justice or
Circuit Judge in said District.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, John A. Shields, clerk of the circuit court of the United States for the southern district of New York, do hereby certify that Eugene R. Leland is good and sufficient surety for the amount of the within bond.

JOHN A. SHIELDS,
[SEAL.] *Clerk of the Circuit Court of the United States*
for the Southern District of New York.

404 SOUTHERN DISTRICT OF NEW YORK, ss:

I, Eugene R. Leland, of No. 55 West 27th St., New York, the surety above named, do solemnly swear that, after paying my just debts and liabilities, I am worth one thousand dollars in real estate in my own name situate in the county of Suffolk, in the State of New York, eastern dist. of New *of New* York.

EUGENE R. LELAND.

Sworn to before me the 18th day of June, 1890.

JOHN A. SHIELDS,
[SEAL.] *Clerk of U. S. Circuit Court, S. D. of New York.*

405 THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, Eastern Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause, as the same appears of record in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 2nd day of August, A. D. 1890.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk.*
JANIE W. COWEN, *Deputy.*

406 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Mercantile Trust Company, the Kanawha and Ohio Railway Company, the Toledo and Ohio Central Railway Company, and the Shawnee and Muskingum River Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an order allowing an appeal filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, on the petition of Erwin Davis, wherein the said Erwin Davis is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said Kanawha and Ohio Railway Company, mentioned in the said petition and order allowing said appeal, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 27th day of February, in the year of our Lord one thousand eight hundred and ninety.

JOHN M. HARLAN,
Justice Sup. C't U. S., Ass'd to 6th Circuit.

407 On this fourth day of March, in the year of our Lord one thousand eight hundred and ninety, personally appeared William S. Dresback before me, the subscriber, and makes oath that he delivered a true copy of the within citation to John W. Simpson, solicitor for the Mercantile Trust Company; C. S. Morgan, general agent of the Toledo & Ohio Central Railroad Co., & 1 to E. C. Winstanley, president of the Shawnee & Muskingum River R'w'y Co.; the Kanawha & Ohio R'w'y Co. not found in my jurisdiction.

W. S. DRESBACK,
Deputy U. S. Marshal.

Sworn to and subscribed before me this tenth day of March, A. D. 1890.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

C. P. WHITE,
Dep. Clerk U. S. Court, E. D., S. D. O.

3 services	$6 00
3 copies	2 00
65 m. of r'd	3 90
	$11 90

WM. S. DRESBACK,
Deputy U. S. M.

[Endorsed:] Citation. # 479. U. S. cir. court, S. D. O., E. D. The Mercantile Trust Company *vs.* The Kanawha & Ohio R'y Co. Citation: Filed M'ch 12th, 1890. B. R. Cowen, clerk.

408 THE UNITED STATES OF AMERICA, *ss:*

To the Mercantile Trust Company, trustee, Greeting:

Whereas Erwin Davis has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the eastern division of the southern district of Ohio made in favor of you, the said The Mercantile Trust Co., trustee, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Columbus, in the sixth circuit, this 20th day of June, in the year of our Lord one thousand eight hundred and ninety,

GEO. R. SAGE,
District Judge of the U. S. District Court within and for the Southern Dist. of Ohio, Sitting and Holding Circuit Court, there Being no Associate Justice or Circuit Judge of the United States in said District.

409 Service of within citation is acknowledged June 22nd, 1890.

THOMAS THACHER,
Counsel for Mercantile Trust Company.

[Endorsed:] United States circuit court, S. D. O., E. D. No. 479. The Mercantile Trust Co. *vs.* The Kanawha & Ohio R'y Co. *et al.* Citation to appellee. Filed July 2d, 1890. B. R. Cowen, clerk.

Endorsed on cover: Case No. 14,367. S. Ohio C. C. U. S. No. 320. Erwin Davis, appellant, *vs.* The Mercantile Trust Company, trustee. Filed October 21, 1890.

MAR 20 1894
JAMES H. McKENNEY,
CLERK.

RECORD CASE No. 14367.

Supreme Court of the United States,

OCTOBER TERM, 1893,

Term No. 320.

ERWIN DAVIS,

Appellant,

vs.

THE MERCANTILE TRUST COMPANY,

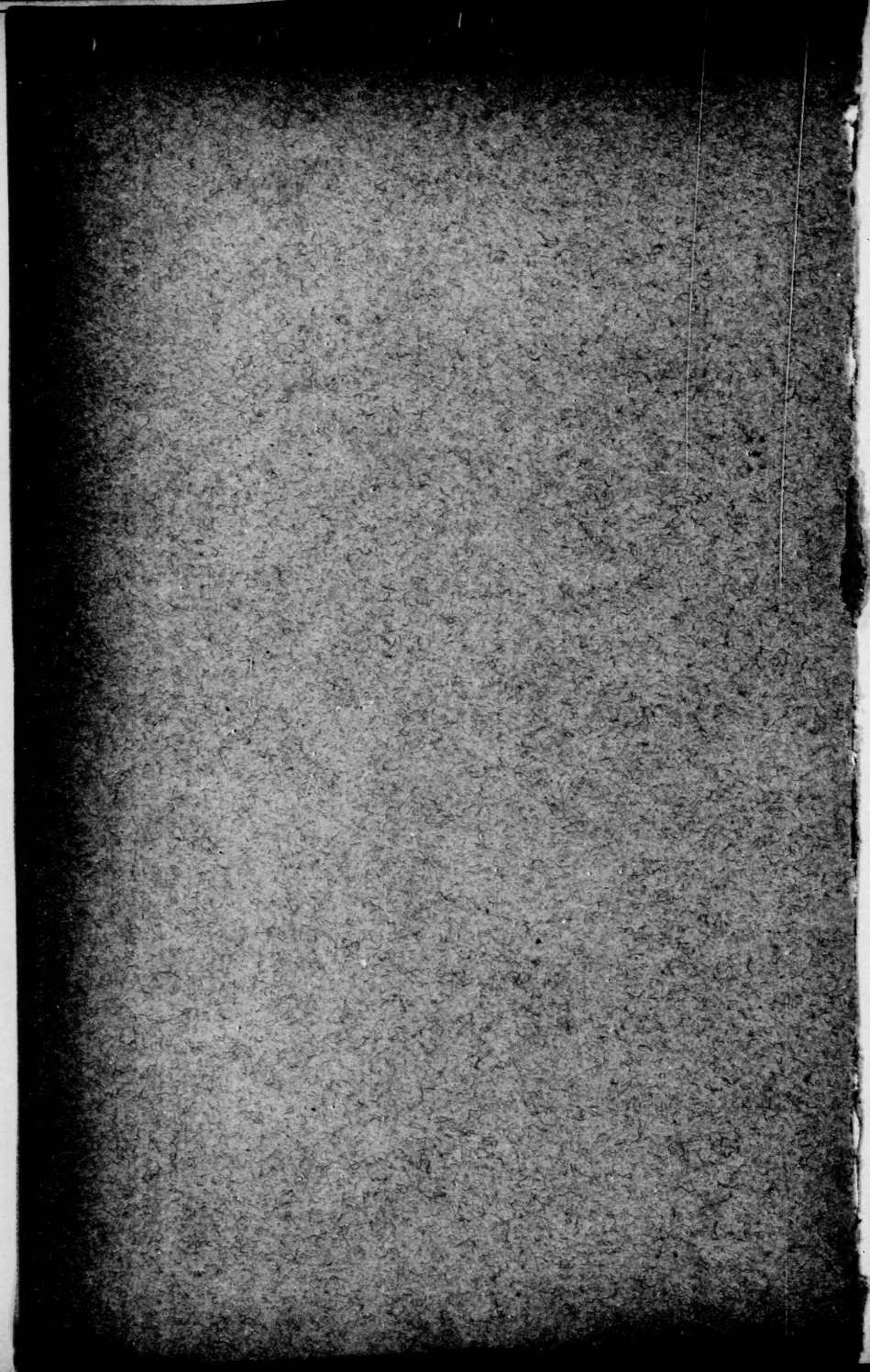
Trustee.

BRIEF FOR APPELLANT.

WALTER S. LOGAN,
CHARLES M. DEMOND,
Of Counsel.

LOGAN, CLARK & DEMOND,
Attorneys for Appellant.

HAMILTON STEAM PRINT, 12 BARCLAY STREET, NEW YORK.



Supreme Court of the United States.

ERWIN DAVIS,

Appellant,

against

THE MERCANTILE TRUST COMPANY, Trustee,

Appellee.

Brief on Behalf of the Appellant, Erwin Davis.

The following is a brief statement of facts:

The Kanawha and Ohio Railway Company, a corporation of Ohio and West Virginia, having made a certain mortgage to the Mercantile Trust Company, a corporation of New York, to secure an issue of bonds, defaulted in the interest, and on February 18th, 1889, the Mercantile Trust Company, as trustee, filed its bill of foreclosure against the Kanawha and Ohio Railway Company in the Circuit Court of the United States for the Southern District of Ohio, Eastern Division. The allegations of the bill will be found on pages 1 to 8 of the record, a full copy of the mortgage on pages 9 to 28 of the record and Exhibit B; an agreement be-

tween Erwin Davis and John W. Simpson with the Mercantile Trust Company, and referred to in the bill, will be found at pages 28 to 30 of the record.

The bill alleges that the Railroad Company is a corporation of Ohio and West Virginia; that on May 1st, 1886, it issued its bonds, and also made a mortgage to secure them to the Mercantile Trust Company. This was the usual railroad mortgage, and included its railroad in the two States, its lands, tracks, structures, etc., rolling stock; in fact, all of its property.

The mortgage also included the interest of the Railroad Company in a certain railroad bridge situated at Point Pleasant, in the State of West Virginia, with the railway and other property in connection with it. This mortgage was subject to the lien of certain mortgages known as the Mineral Division mortgages of the Ohio Central Railroad Company.

The bill in Paragraph VI further alleges that under the mortgage the Railroad Company covenanted to have transferred to the Mercantile Trust Company certain stock and bonds of the Point Pleasant Bridge Company, representing substantially the whole interest in said bridge. The bill alleges that the railroad bridge at Point Pleasant is used as a part of the line of the railroad, connecting its railroad in West Virginia with its railroad in Ohio; that at the time of the railroad mortgage the bridge was subject to a lien of a mortgage made by Erwin Davis and wife and John W. Simpson to Alexander M. White and others; that this mortgage has since been discharged.

The bill further alleges that pursuant to the covenant of the Railroad Company one million dollars worth of bonds of the Bridge Company secured by a mortgage of the Bridge Company to John W. Simpson, as trustee, and $998,000 worth of the stock of said Company, being all of the stock

except $2,000, viz.. the entire property in the Bridge, except $2,000, were on July 2d, 1886, delivered to the Mercantile Trust Company by Erwin Davis and Mr. Simpson, to be held under an agreement, which is Exhibit B.

From the bill it further appears that $1,160,000 worth of bonds were issued under the railroad mortgage, The Mercantile Trust Company reserving $111,000 worth; that on January 1st, 1889, semi-annual interest was due on the bonds and some of it has not been paid; that there is a large floating debt amounting to $350,000, and the Company is insolvent, there is danger of attachment of its property, taxes are unpaid, wages are due for labor, and for various current expenses. The Mercantile Trust Company, in its prayer for relief, asks that the mortgage be decreed to be a lien upon all the property of the Kanawha and Ohio Railway Company described in the mortgage; that the Company pay all arrears of interest now due, or which may become due and payable, together with interests and expenses; and in default thereof, that the Company and all other persons claiming under it be barred and foreclosed; that the premises described in the mortgage be sold as an entirety; and "*that at the same time and with such mortgaged property and franchises be sold the bonds and stock of the said Point Pleasant Bridge Company now held by your orator as aforesaid.*" The bill prays for the usual distribution of the proceeds of sale, also prays for a receiver, injunction and subpœna.

It will be noted that the bonds and stock of the Bridge Company were not included in the mortgage. The manner in which they became a part of the mortgage security is shown by an examination of Exhibit B, found at pages 28, etc., of the record.

This was an agreement dated July 2d, 1886, between Erwin Davis and John W. Simpson of New York of the first part, and the Mercantile Trust Company of the second part. It recites that Messrs.

Davis and Simpson have handed over to the Mercantile Trust Company 9,980 shares of the stock of the Bridge Company and $1,000,000 worth of the bonds of said Company "in order to further secure the payment of a series of bonds of the Kanawha and Ohio Railway Company for the principal sum of $1,000 each and not exceeding 1,800 in number."

This transfer is made pursuant to the covenant in the mortgage (p. 28), and the agreement recites that the bonds and stock are delivered by the parties of the first part, and are received by the parties of the second part for various purposes, among which is the following:

1st. "The said bonds and stock are to be held as security for all the bonds issued or to be issued under the first mortgage of the Kanawha and Ohio Railway Company, aforesaid, in *addition* to the security of the mortgage of said Railway Company securing the same."

The agreement continues that on payment of any installment of interest on the mortgage bonds outstanding, the interest on the Bridge bonds should be deemed paid for the same period, and when all the mortgage bonds are paid the Bridge bonds shall become void or be surrendered to the Railroad Company, or treated in force and delivered to the Railroad Company, at its option, but that the Mercantile Trust Company shall have all the rights of a holder of these Bridge bonds to secure the mortgage bonds. The stock shall be held by the Trust Company, but it shall not vote upon the stock as long as the Railroad Company is not in default. When the mortgage is paid the stock shall be assigned to the Railroad Company. The agreement ends as follows: "The intention of this instrument is that all the said bonds and stock hereinbefore stated to have been transferred and assigned to the party of the second part shall be held charged first for the benefit of the holders from time to time of all bonds issued or to be issued under the said first mortgage of the said Railway Company, and thereafter for

the benefit of, and subject to, the direction of the said Railway Company."

It will be observed that although the Bridge stock and bonds were not covered by the mortgage, and although they were by agreement made security in *addition* to the mortgage, nevertheless the bill of complaint prays that both the mortgaged property and the Bridge bonds and stock be together sold to pay the Railroad bonds.

Subpœna issued against the Railroad Company February 18th, 1889 (page 31), and on the same day the Railroad Company appeared (page 32). On February 20th, 1889, an order was made on appearance of the Trust Company and the Railway Company, and without opposition, appointing Robert W. Kelly Receiver of the railway, with power to take possession of and operate the railway, with instructions to pay taxes and expenses for repairs and supplies, with power to prosecute suits; his bond to be $100,000.

The order also provides that the stock and bonds of the Bridge Company shall stay with the Trust Company. February 21st, 1889, the Receiver's oath was filed (page 36), and on the 28th of February, 1889, his bond was filed (page 37).

On March 13th, 1889, the Receiver filed his petition for leave to issue Receiver's certificates. This petition shows that various amounts were due employees, for supplies, taxes, and under certain contracts of the railroad with respect to its rolling stock (page 39).

On March 13th, 1889, the Court made an order directing that certain amounts due employees, and for supplies, taxes, engines and cars be paid, and granting the Receiver authority to issue and borrow on Receiver's certificates of a prescribed form, the order making the certificates a preferred debt. The order provided, however, that it should not become operative, except as to taxes, until the holders of bonds should assent, or until a further order of the Court be filed (see page 55).

On July 24th, 1889, an amended bill was filed. The only differences between it and the original bill are these, that two additional parties are made defendants, viz.: The Toledo and Ohio Central Railway Company, a corporation of Ohio; and also the Shawnee and Muskingum River Railway Company, a corporation of Ohio: and in this that the bill alleges there was $34,800 of interest due January 1st, 1889; and that since January 1st, 1889, $21,000 additional for interest has become due, which has not been paid, and also that the two additional defendants claim some interest in the mortgaged premises, which is inferior to the lien of the mortgage (see page 76).

On October 7th, 1889, the Receiver files his petition referring to his previous petition filed March 13th, 1889, stating that only part of the bondholders have assented to the payments specified in the previous order, although they have all been notified. The petition also sets forth various amounts due and prays leave to pay them (see page 95).

On October 7th, 1889, the Court orders payments on certain rolling stock, to be made out of surplus earnings.

On October 26th, 1889, a decree *pro confesso* is entered against the Shawnee and Muskingum River Railway Company on the amended bill (see page 104).

The appellant, Erwin Davis, now for the first time formally appears in these proceedings. At page 105 we see his petition. He alleges the filing of the original bill by the Mercantile Trust Company, the order on consent appointing the Receiver on February 19th, 1889, his qualification and possession of the Railway Company in Ohio and West Virginia, and that the Receiver was formerly president of the Railway Company. He states the filing on March 4th, 1889, by the Mercantile Trust Company of an ancillary bill in the District of West Virginia, which bill had attached to it the bill filed in Ohio and made substantially the same averments, and

prayed for ancillary jurisdiction in the Ohio court.

The petition continues that on May 25th, 1889, the Trust Company moved the West Virginia court to confirm the appointment of Mr. Kelly as Receiver, which motion was denied without prejudice to the bringing of a separate suit in West Virginia; that the order was made by Mr. Justice Harlan; that subsequently the Mercantile Trust Company filed its bill in West Virginia substantially the same as the Ohio bill, praying for the appointment of Mr. Kelly as Receiver, or for the protection of Mr. Kelly as Receiver of his possession in West Virginia. That on August 21st, 1889, the Trust Company petitioned in West Virginia for the appointment of Mr. Kelly; that this appointment was opposed by Erwin Davis and his counsel and was denied; that there is no Receiver of the Railroad in West Virginia except so far as Mr. Kelly has powers under the order of the Ohio court; that the petitioner, Erwin Davis, is the owner of over $100,000 in mortgage bonds of the railroad, and more than two million dollars in shares of its first and second preferred and common stock. The petition continues with allegations showing that the failing condition of the Railroad was brought about by Mr. Kelly's mismanagement when president of the road, that he is incompetent and an improper person to be appointed Receiver, that the Railroad is not insolvent but has been mismanaged by its officers and could pay up if properly managed.

The petitioner, Erwin Davis, says that if the management of the Railroad be placed under his control he will take a lease of the road for twenty years, pay interest on the bonds, and after paying necessary expenses for running and keeping the road in repair, will divide the net proceeds among the stockholders of the corporation. Mr. Davis prays that for the reason stated Mr. Kelly be removed as Receiver and some other disinterested person appointed (see page 105).

On October 30th, 1889 (p. 110) a decree *pro con-*

fesso was entered against the Kanawha and Ohio Railway Company. On November 13th, 1889 (p. 117) the Court denied the petition of Mr. Davis which requested the removal of the Receiver, but the Court ordered that Mr. Davis be permitted to intervene and be at liberty to be heard upon any and all proceedings for the protection of his interests as bondholder and stockholder of the Railway Company.

On December 5th, 1889, Mr. Davis filed another petition (see page 128). This petition sets forth the filing of the bill, the fact that the mortgage included the interest of the Railroad in the Point Pleasant Bridge, that the mortgage was subject to the Mineral Division mortgage, the fact of the covenant by the Railroad to deliver stock and bonds of the Bridge Company as collateral security for the mortgage bonds and that the bridge was used as a part of the Railroad, the fact that the stock and bonds of the Bridge Company were delivered pursuant to the contract (Exhibit B) set forth in the bill, the fact that $1,116,000 worth of the bonds were outstanding and $111,000 worth reserved, the fact that certain interest is unpaid, and the fact that the bill prays for the sale of the mortgaged premises, including the bridge bonds and stock.

Mr. Davis's petition in Paragraph VIII thereof then goes on to say that he is the Erwin Davis referred to in the bill, and owns over $100,000 in bonds and two million dollars' worth of the stock of the railroad ; that while the bill admits that the Mineral Division mortgages are prior liens, nevertheless the Ohio Central Railroad, which made the Mineral mortgages, is not a party, nor does the bill show what part of the Railroad is covered by these mortgages, nor does it show their amount ; that while the bill states that the other defendants, viz., the Toledo and Ohio Central Railway Company and the Shawnee and Muskingum River Railway Company, have interests in the mortgaged premises, the bill does not define that interest or

its extent. He further alleges that it appears by the bill that the mortgage bonds sold amount to $1,160,000, and that to secure these the trustee holds Bridge bonds to the amount of $1,000,000, secured by mortgage on the Bridge, and also $998,000 of the Bridge Company's stock, all of which is in addition to the property covered by the mortgage, and that the bill does not show that the Bridge Company is insolvent or has defaulted on its bonds, and the petition alleges that the Bridge Company is an independent corporation of West Virginia, and that its bonds and stock should be first applied to payment of the mortgage debt before the Railway property is sold, and yet that nevertheless the bill prays for the sale of both Bridge bonds and stock and mortgaged property together.

The petitioner further alleges that a sale of all the Railroad property, if a sale be decreed, before the lien of the Mineral Division mortgages and the extent of the interests of the other defendants are ascertained, especially a sale of the bonds and stock of the Bridge Company as an entirety with the Railway property, would destroy the entire interest of Mr. Davis as a stockholder in the Railroad and would cause him great loss and damage.

The petitioner further alleges that, under the allegations of the bill, it is represented that the Company has a floating debt of about $350,000. He further states that, since the filing of the bill, the Kanawha and Ohio Railway Company, in a suit brought by the Kanawha Improvement Company in West Virginia, on August 7th, 1889, without the filing of any declaration, confessed judgment in the sum of $285,232.20; that he, the petitioner, Mr. Davis, as bondholder and stockholder of the Railroad, on behalf of himself and all other bondholders and stockholders of the Railroad, has filed a bill in West Virginia against the Kanawha and Ohio Railway Company and the Kanawha Improvement Company to set aside this judgment.

The petitioner further alleges that there should be no decree of sale until a reference should be had to ascertain the liens upon the property, the amount of the liens, the order of their priority, and until the validity of the judgment so confessed should be adjudicated.

Mr. Davis prays that this his petition be read and considered at the hearing, that the Court will not enter a decree of foreclosure until the matter set forth in this petition shall have been fully heard, and a proper reference to a master be made to ascertain the liens upon the Railroad and the order of their priorities. This petition of Mr. Davis will be found between pages 128 to 134 of the record.

Attached to this petition as Exhibit A is a copy of the bill filed by Mr. Davis in the courts of West Virginia to set aside the judgment confessed, as aforesaid. This is found at pages 134 to 139 of the record. In brief this bill in West Virginia, among other things, directly charges that the confession of the said judgment was intended to secure an unlawful priority for the Kanawha Improvement Company; that no judgment should have been confessed after a Receiver had been appointed. Mr. Davis charges the judgment is void; that the Railroad Company does not owe these moneys to the Improvement Company; that the Improvement Company has no assets except stock in the Railroad Company; that the parties appeared by the same attorneys, and that the transaction was affected with fraud; that the alleged power of attorney appointing an attorney of the Company to confess this judgment was invalid, because there was no legal meeting of the Board of Directors of the Railway Company July 29, 1889, when the power of attorney was said to have been executed. Various interrogatories are filed with the bill to be answered by the defendants.

December 5th, 1889 (see page 139), motion was made to strike this petition from the files, but no

subsequent steps were taken under this motion. December 5th, 1889, the Toledo and Ohio Central Railway Company consents to the entry of a decree as *pro confesso* (see page 151).

On December 5th, 1889 (see page 151) an order was entered by the Court, which is as follows: "This cause coming on this day to be heard upon the amended bill of complaint taken as confessed against all the defendants, it is on motion of the solicitors for the complaint

Ordered, that it be and is hereby referred on suggestion of counsel to B. R. Cowen, who is hereby appointed Special Master for the purpose, to inquire and report

(1). What amount of bonds of the Kanawha and Ohio Railway Company, secured by the mortgage mentioned in said amended bill of complaint are now outstanding.

(2). What amount of the interest upon said bonds due January 1st, 1889, is unpaid, and what amount of interest upon said bonds due July 1st, 1889, is unpaid, and what amount of interest is unpaid, and what amount of interest upon said bonds will become due on January 1st, 1890."

On the same day Mr. Cowen filed his oath (page 152), and on the same day likewise (page 152) rendered his report, in which he says that he has been attended by counsel for the complainant and by a director of the Company as a witness for the complainant; that he has taken testimony and reports that 1,160 of the bonds secured by the mortgage for the principal sum of $1,160,000, are outstanding, that of the interest upon the bonds due January 1st, 1889, $25,680 is unpaid, that all the interest due July 1st, 1889, $34,800 is unpaid, and that the sum of $34,800 will become due as interest upon the bonds on January 1st, 1890.

Likewise, upon the same day, December 5th, 1889, judgment of sale is entered (see page 153).

This judgment recites that the cause was heard on the original and amended bills, and upon the orders for decree *pro confesso* entered against the defendants, The Kanawah and Ohio Railway Company, the Shawnee and Muskingum River Railway Company and on the consent of the Toledo and Ohio Central Railway Company, the report of Mr. Cowen, the master, and "*all the proceedings herein.*"

Among the proceedings upon which the decree was made is, of course, the petition of Mr. Davis, filed the same day, and which we have referred to (see page 134), and inasmuch as the decree does not grant any of the requests in the petition, or direct the taking of the proceedings requested, it is clear that the Court ruled against the petitioner.

The decree of the Court, as entered, adjudges that the Kanawha and Ohio Railway Company is a corporation of the States of Ohio and West Virginia, and the owner of the property mentioned in the mortgage and that the bonds and the mortgage were made by the Company. It recites property covered by the mortgage as therein specified, and that the mortgage was made subject to certain mortgages known as the Mineral Division mortgages of the Ohio Central Railroad Company; that, in compliance with the covenant in the mortgage, $1,000,000 in bonds and $998,000 in stock of the Bridge Company was delivered to the complainant as further security for the mortgage; that of the mortgage bonds 1,160, aggregating $1,160,000, had been issued; that on January 1st, 1889, interest in the sum of $34,800 became due, of which only $9,120, being the interest on 304 of said bonds, has been paid, leaving $25,680 unpaid, and in default; that also since January 1st, 1889, and before the filing of the original bill, 730 interest warrants, falling due January 1st, 1889, were presented for payment, and payment refused; that on July 1st, 1889, $34,800 of interest additional became due, which is unpaid.

The Court further finds that the railway bridge at Point Pleasant and its approaches, which are represented by the said bonds and stock of the Bridge Company, are used as a part of the Railroad line connecting the Railroad in Ohio with that in West Virginia; that the defendants, The Toledo and Ohio Central Railway Company and the Shawnee and Muskingum River Railway Company, have an interest in part of the mortgaged property acquired subsequent to the making of the mortgage and the bonds, but the decree does not specify what that interest is, nor upon what part of the line it exists.

The decree further provides that within thirty days from date the Railway Company or the defendants, or some persons for them, pay the interest unpaid January 1st, 1889, viz., $25,680, with interest thereon, also the sum of $34,800, with interest thereon, due July 1st, 1889, and unless such payments be made before January 1st, 1890, the further sum of $34,800, with interest, due January 1st, 1890, besides the costs of the suit, and in default thereof, that the lien of the mortgage be foreclosed, and "that all the property, rights and franchises hereinbefore described, and every part and parcel thereof *and all the said bonds, and the said stock of the Point Pleasant Bridge Company hereinbefore mentioned, be sold together as an entirety,*" by a commissioner therein named, at public auction, on a date to be fixed by the Commissioner, with power to the Commissioner to *adjourn* the sale from time to time *without further notice* except an announcement of the postponement made at the time and place previously fixed for such sale. Public notice to be given by publication at least forty-five days prior to the time of sale.

The entire property subject to the Mineral Division mortgages shall be sold for not less than $500,000 unless the Court otherwise orders.

No bid shall be accepted unless the bidder de-

posit $50,000; the Commissioner to report the sale for confirmation.

The decree provides that such further portions of the purchase price shall be paid *in money*, as the Court shall from time to time direct, in order to meet claims which the Court may adjudge to be prior to the mortgage mentioned in the bill, the Court reserving the right to resell if these other moneys be not paid over within twenty days of any order made, and "that the balance of said purchase price shall be paid in money or in first mortgage bonds of the Kanawha and Ohio Railway company and the unpaid and over-due coupons, and that such bonds and coupons be taken at such price or value as the holders thereof would have been entitled to receive on a distribution of the proceeds of sale in case the entire amount of the bid had been paid in money."

Such sale shall be without redemption and shall foreclose the right of the defendants and persons claiming under them to the mortgaged premises, or "to the stock and bonds of the Point Pleasant Bridge Company named in said amended bill of complaint."

Upon confirmation the Commissioner shall execute a deed of all the mortgaged property, including the bonds and stock of the Bridge Company, and the Kanawha and Ohio Railway Company shall also execute a similar deed, and the Trust Company shall then deliver to the purchasers all of said bonds and stock of the said Bridge Company.

Touching the distribution of the proceeds of sale the Court reserves the questions, and any party to the action or the Commissioner may apply to the Court for further directions.

The decree concludes as follows: "Thereupon came the intervening petitioner, Erwin Davis, and prayed the Court for the allowance of an appeal with *supersedeas* from the foregoing decree, and the Court thereupon refuses the appeal."

On January 11th, 1890, it appearing that the thirty days specified in the decree for payment had expired, and no payments had been made, the Commissioner by order is directed to make the sale (see page 162).

On February 20th, 1890, the Adams Express Company files a petition praying for a first lien as to certain receiver's certificates issued by a former Receiver of the property. The Receiver was Mr. Thomas R. Sharpe, who had been appointed by the United States Court of West Virginia Receiver of the Ohio Central Railroad Company, which had formerly owned the property in question (see page 167).

On February 21st, 1890 (see page 171), the Receiver, Robert W. Kelly, prays for authority to pay certain indebtedness for labor, services, supplies, etc.; to borrow money and issue certificates therefor, and on the same day (see page 178) the Court, by order, authorized him to pay various debts and to borrow on certificates, which shall be a first lien, to an amount not exceeding $90,000.

On February 25th, 1890 (see page 179), the Mercantile Trust Company files its answer to the petition of the Adams Express Company, praying for a denial of the petition, and also (see page 182) a similar answer is filed by the Kanawha and Ohio Railway Company.

On March 1st, 1890, the appellant, Erwin Davis, files his petition addressed to the Honorable J. M. Harlan, Associate Justice of the Supreme Court, praying for an appeal.

The grounds of the appeal as set forth in the petition are as follows: Mr. Davis, of the State of New York, sets forth the pendency of the suit by the Trust Company, a corporation of New York, against the Kanawha and Ohio Railway Company, a corporation created and existing under the laws of Ohio and West Virginia, and others, to foreclose the mortgage, to secure the payment of certain bonds, and also to secure the sale of certain other

property, to wit, $1,000,000 in bonds, and $998,000 in stock of the Point Pleasant Bridge Company, "said to have been delivered by said Railway Company to said complainant by way of pledge or collateral security for the payment of said bonds of said Railway Company."

That the Railway Company made no defense, and that on learning that no defense was intended, and that the proper and necessary proceedings were not to be first had, Mr. Davis, a large owner of bonds and stocks of the Railway Company, filed his petition and was permitted to intervene, and showed to the Court his ownership of bonds and stock, and his interest in the financial condition of the Company, and in having its assets justly devoted to the payment of its debts.

The petition goes on, and Mr. Davis thereupon showed that it appeared there were other and prior mortgages upon portions of the property, known as the Mineral Division mortgages, but that the bill and proceedings do not show upon what portion the prior mortgages were, nor their amount; that also neither the beneficiaries nor the trustee under such prior mortgages were made parties; furthermore, whereas the bill alleges with respect to the other defendants that they claim an interest in the mortgaged property subsequent to the lien of the mortgage, the nature and extent of the interest is not set forth; and that furthermore, whereas the bill shows that the trustee holds the bonds and stock of the Point Pleasant Bridge Company, a West Virginia corporation, as additional security for the payment of the bonds named in the mortgage, said bonds and stock of the Bridge Company being the total interest in said Bridge Company, except $2,000 worth of stock, it nevertheless does not appear that the Bridge Company is in default in paying interest on its bonds or is insolvent and that he, the petitioner, Erwin Davis, insisted that this collateral security should first be exhausted.

Mr. Davis further sets forth that in his previous petition he had shown that the bill for foreclosure alleged a floating debt of about $350,000; that subsequently, on August 7th, 1889, in a suit brought in West Virginia by the Kanawha Improvement Company, in which no declaration was filed showing the cause of action, the Kanawha and Ohio Railway Company confessed judgment in the sum of $285,233.30; that Mr. Davis, as bondholder and stockholder, in behalf of himself and all others, had filed a bill in equity in the West Virginia Court impeaching the judgment for fraud and praying to have it annulled and set aside; that he, Erwin Davis, had insisted that no sale of the property of the Kanawha and Ohio Railway Company should be decreed until after the liens thereon and the priorities thereof should first be ascertained by a proper reference to and report of a Master and the validity of the judgment determined as confessed; but that nevertheless the Court, without determining any of these questions, and without any reference at all excepting to ascertain the amount of the outstanding bonds, a reference made on the same day as the decree of sale, did on said day render a final decree in the cause, directing the sale of all the mortgaged property, including bonds and stock of the Point Pleasant Bridge Company as a whole and directing the application of the purchase money to a large extent.

That this decree was made upon the bill taken as confessed without any previous reference to ascertain the owners of the outstanding bonds; that no holder has proved them in the cause or made any demand to have the property sold; that the decree was made without the necessary and proper steps to render the same legal and proper, and that the decree is erroneous in the particulars mentioned, as well as in others; that he prayed the Circuit Court to grant an appeal, which was denied; that the decree directs that unless the unpaid interest shall be paid within thirty days from the decree, the prop-

erty shall be sold; and therefore Mr. Davis prays that an appeal from and *supersedeas* to the decree of the Circuit Court be allowed.

Mr. Justice Harlan on January 31st, 1890, postponed the further hearing of the application for the appeal before himself at Washington on February 7th, 1890, a hearing to be upon notice to the Trust Company and the Railway Company (see page 185).

On February 7th, 1890, the matter was argued, and Mr. Justice Harlan held that the order of November 13th, 1889, permitting Mr. Davis to intervene and giving him liberty to be heard, and the proceedings of December 5th, 1889, showing the filing by Mr. Davis with leave of the Court of his intervening petition, made him a party to the cause with the right of appeal. He, therefore, grants the right of appeal, and stated the conditions under which a *supersedeas* bond will be granted. This order is dated February 11, 1890 (see page 186).

On March 1st, 1890, Mr. Davis files his appeal bond, which is not a *supersedeas* (see page 188), and on March 12th a citation was isued by Mr. Justice Harlan dated February 27th, 1890, and directed to the complainant in the suit as well as the three Railroad Companies, defendants.

As appears by the report of sale, the sale took place March 4th, 1890 (see page 191), and on March 7th, 1890, Mr. Davis filed his appearance in the Clerk's office of the Court giving notice of his opposition to the confirmation of the sale, and requested that he be notified seasonably of the time and place of any application for its confirmation (see page 190).

On March 19th, 1890, the report of the sale was filed by Special Master P. W. Huntington (see pages 191 and 192). This report states, in substance, that, pursuant to the decree, Tuesday, March 4th, 1890, at twelve o'clock noon, was fixed as the time of sale. Public notice was given by publication for forty five days. On March 4th,

1890, at the Court House, in Columbus, Ohio, the property was offered for sale, including the bonds and stock of the Point Pleasant Bridge Company, and that Nelson Robinson and William B. Post, of New York, bid $505,000 for the property, and it was sold to them. They deposited, prior to the acceptance of the bid, $50,000. The Commissioner recommends that the sale be confirmed.

On March 22d, 1890, the following motion was filed in the Clerk's office of the Court, entitled in the cause "P. W. Huntington, Commissioner appointed herein to make sale as provided in the decree entered December 5th, 1889, having filed his report of same, the complainant moves that said report, and the doings therein reported, be approved and confirmed, and that the Court make such further order or decree as may be proper in the premises.

ALEXANDER & GREEN,
SIMPSON, THATCHER & BARNUM,
Solicitors for Complainant.

I fix the fifth day of April, 1890, at nine and a half o'clock, A. M., as the time, and the United States Circuit Court in Cincinnati, O., as the place, for the hearing of the above motion.

GEORGE R. SAGE,
United States District Judge.

March 22d, 1890."

See page 197.

Annexed to this notice is an affidavit stating that a copy of the notice was mailed to Honorable J. B. Jackson, Parkersburg, West Virginia, and that the letter was registered and mailed March 22d, 1890 (see page 197).

On April 7th, 1890, an affidavit by Davis, verified April 3d, 1890, was filed in Court. This affidavit shows that the Commissioner appointed to make

the sale had been authorized to proceed with the sale, and to make adjournments, from time to time, without giving to Mr. Davis, or any other persons interested in the sale, any notice whatsoever of such sale or adjournments, that the property was sold by the Master on a day prescribed without any notice to Mr. Davis, and that because of the uncertainty as to the time of sale owing to the provision contained in the decree by which the Master was enabled to fix and adjourn the sale, from time to time, without notice, and because of Mr. Davis's continuous and pressing business engagements which prevented him from personally watching the sale, and because of the action of the Master, Mr. Davis could not keep himself informed about it.

That the property was sold for an inadequate price; that it was worth much more than the price obtained; and much more would have been obtained had any notice of sale been given to the persons interested, and particularly to Mr. Davis.

That he, Mr. Davis, is now and was at the time of the sale willing, and in the affidavit offers to pay ten per cent. more upon the purchase price of the property than was obtained, and that upon any resale which may be ordered by the Court Mr. Davis will and agrees to pay such additional ten per cent. over and above the price obtained (see page 204).

Also on the same day (see page 205) Mr. Davis filed in the Clerk's office a formal offer to purchase the property for a price ten per cent. in excess of that obtained should the Court order a resale.

On the same day counsel filed (see page 206) a memorandum showing the disbursements and services in the cause.

Likewise on the same day the Receiver files a report showing that the amount of Receiver's indebtedness, including certificates authorized and issued, does not exceed "over and above cash on hand and receivable, and is about the sum of $105,000." Nothing is said about the exact amount.

Likewise upon the same day, April 7th, 1890, the decree of confirmation of sale was made.

This decree recites that the cause came on further to be heard upon the application of the trustee to confirm the sale and the report of the Commissioner, and "It appearing to the Court that sufficient notice of the hearing of this application has been given the solicitors for the parties to this cause," the Court holds that due notice of the sale was given, that the amount bid was the highest and best bid for the property ordered to be sold. And therefore the Court adjudges that the sale and all the proceedings of the Commissioner be confirmed. The Court states that the purchasers have paid on account of the $505,000, the purchase price, as follows: In money $50,000, and now as further payment, tender 1,069 of the first mortgage bonds of the Railway Company for the principal sum of $1,069,000, all of which have attached coupons representing interest due July 1st, 1889, and thereafter, except 9, which have attached coupons due January 1st, 1890, and thereafter, and that the purchasers, in addition, tender 768 coupons of $30 each, representing interest maturing on 768 of the bonds, January 1st, 1889, amounting in the aggregate to $23,040.

Whereupon the Court orders "that the coupons representing interest on said bonds maturing January 1st, 1889, be and they hereby are accepted on account of said purchase price at the face value thereof," and that the remainder of the coupons and bonds be accepted on account of the purchase price, at such price or value as the holders thereof would have been entitled to receive on a distribution of the proceeds of sale in case the entire amount of the purchase price or bid had been paid in money, such price or value not being determined, but to be determined hereafter in this cause. The Commissioner to hold the bonds and coupons subject to further order that when the distributive share of the proceeds of sale shall have been determined, the

bonds and coupons, after being properly marked, may be returned to the purchasers or their assigns.

The report further sets out that as it appears the distributive share of the proceeds of sale applicable on the bonds and coupons not tendered by the purchasers will in no event exceed the sum of $30,050, and that the indebtedness of the Receiver, including certificates issued, will not exceed, and is about $105,000, and that the portion of the purchase money necessary to be paid in cash, in addition to the $50,000 already paid, cannot be precisely ascertained until a further Receiver's report be made. The Court orders that, in addition to the $50,000 paid, the purchasers pay into Court a further sum of $102,140.07 in money or in Receiver's certificates, to be taken at par and accrued interest, and that upon the payment of this additional sum of money, or in certificates, the Commissioner execute, deliver and acknowledge for record, a deed conveying to the purchasers or their assigns, all the property so sold as aforesaid. The conveyance, however, to be made subject to the payment of any sums which the Court may hereafter direct to be paid in money.

The Court further directs the Kanawha and Ohio Railway Company to likewise execute a deed to the purchasers or their assigns, conveying the mortgaged property, "including said bonds and stock of the said Point Pleasant Bridge Company," and that the complainant shall also deliver to the same persons the bonds and stock.

The Court orders that out of the $50,000 already paid in money, the costs, as taxed, amounting to $963.90, be paid, also the expenses of sale of $126.37, compensation to the Commissioner $1,000, and to the trustee the amount of its disbursements and obligations, amounting to $15,000, and for this purpose, that the aggregate amount of these sums, other than the costs, viz., the sum of $16,126.37, be forthwith paid from the Registry of the Court to the Commissioner, and he is directed to make the

payments and take vouchers and report his proceedings.

The Receiver is further directed to surrender possession and make his final report, showing the indebtedness incurred by him and unpaid; the matter to be referred to Mr. Cowen for examination, who shall report on the subject.

The Court adjudges that all further questions be reserved.

At the foot of the decree an appeal from this decree by Mr. Davis is allowed to the Supreme Court of the United States.

This decree is found at pages 207 to 210.

Mr. Davis duly files his appeal bond (page 210). The citation duly issues on this appeal to the trustee and the parties defendant in the suit, dated February 27th, 1890 (pages 212 and 213).

On the same day that the decree confirming the sale was filed, the purchasers filed an affidavit showing the existence of a plan for reorganization. This affidavit is found at pages 198 to 204. The plan of reorganization is dated March 20th, 1890. It is therein claimed that 960 of the 1,160 bonds agreed to the plan, which is to form a new Company, issue bonds and stock, and to allow holders of bonds which have been foreclosed, stockholders of the old Railway Company and stockholders of the Kanawha Improvement Company to participate in the new Company in certain proportions and upon paying certain amounts of money. Various debts and prior liens are to be paid off or secured. The proposition involves the deposit of bonds and stock.

Having annexed this circular for reorganization to their affidavit, the affidavit proceeds to set forth the following facts: The Kanawha and Ohio Railway Company has outstanding stock $12,200,000; that besides the Mineral Division bonds which are prior to the mortgage herein, and trust bonds for equipment of the road and the indebtedness of the Receiver, forwhich certificates have been authorized,

the indebtedness of the Company is approximately as follows:

1. First mortgage bonds and principal,	$1,160,000
2. Interest thereon to April 1, 1890....	111,680
3. Kanawha Improvement Company's judgments with interest, about.....	300,000
4. Notes secured by mortgage on a farm, with interest, about.....	12,350
5. Notes secured by mortgage on coal lands, with interest to April 1st, 1890...	20,925
6. Miscellaneous accounts, about.....	20,000

That the Improvement Company owns about 65,000 shares of the Railway Company's stock; that prior to the sale the purchasers who then owned or represented many of the bonds and coupons and items 3, 4 and part of item 6, and all the Receiver's certificates which had been issued, informed the bondholders, including Mr. Davis, of their purpose to bid, and offered to all the opportunity to share in the purchase, if made upon the terms shown in the reorganization circular; that immediately after the sale the purchasers issued the reorganization circular, and all persons are treated alike who have the same interests; that the right to participate is still open to all.

Since the sale additional bonds have been deposited, and now the total amount is 1,069 bonds, including, substantially, all unpaid coupons, and among these are 70 deposited April 2d, 1890, by Mr. Davis, who says he intends to deposit the rest; that Mr. Davis has repeatedly expressed his satisfaction with the terms of the reorganization circular.

This is, in substance, the situation.

This statement of facts has necessarily been somewhat voluminous, in view of the length of the record and the conflicting and complex interests which are involved. We have endeavored to set forth only those proceedings in full which most directly affect the appellant. In addition, the record discloses the following proceedings:

Petition of Atlantic Trust Company, praying payment of car trust coupons (page 66).

Cross-bill of Edwin Thatcher, praying payment of debt due for building purposes (page 88).

Cross-bill of H. R. Matthias, praying payment for machinery (page 92).

Petition of Henry O. Bleness, praying payment of debt due for bricks furnished (page 111).

Petition of E. S. Bright, praying payment for railroad ties furnished (page 115).

Petition of the Atlantic Trust Company praying payment for amounts due under car trusts (page 117).

Petition of the West Virginia Printing Company praying payment for printing (page 140).

Petition of Roy & Company praying payment for timber furnished (page 142).

Petition of Frank Woodman praying payment for repairs (page 146).

Order granting leave to the Adams Express Company to file a petition to enforce a lien by reason of prior Receiver's certificates (page 151).

Petition of the Trimble Mill Company praying payment for materials and labor (page 160).

Petition of the Argand Refining Company praying payment for oil (page 162).

Petition of the Lake Shore and Michigan Southern Railway praying payment of balance of debt due (page 165).

Petition of the Adams Express Company praying for a prior lien by reason of Receiver's certificates (page 167).

The record in this case was filed in the Supreme Court, October 21st, 1890.

Additional Statement of Facts.

A certain portion of the line of the Kanawha and Ohio Railway Company was subject to certain mortgages which had been made by the Ohio Central Railroad Company January 1, 1881, when that company had previously owned that portion of the railroad. The mortgage refers, at page 14, to these, as follows, namely, that the mortgage was subject as to that part of the railroad formerly known as the Mineral Division of the Ohio Central Railroad, running from Corning, Ohio, into the counties of Perry and Athens, to a point near South Shawnee, Ohio, to the lien of certain mortgages known as the Mineral Division mortgages of the Ohio Central Railroad, made January 1, 1881. It appears that the Ohio Central Railroad was reorganized by reorganization agreement, dated March 7, 1885. At page 9 of the record it appears that the Kanawha and Ohio Railway Company was formed pursuant to an agreement to reorganize the River Division of the Ohio Central Railroad Company, dated March 7, 1885, which was made between holders of the River Division first mortgage bonds of the Ohio Central Railroad Company and a committee of reorganization consisting of Mr. Erwin Davis and others (see also page 28).

The Point Pleasant Bridge, which crossed the Ohio River, was subject to a mortgage made October 13, 1885, to secure an issue of bonds. This mortgage was made by Mr. Davis and Mr. Simpson to the Messrs. White. Prior to the present suit that was paid (see record, page 15). On January 29, 1886, the Committee of Reorganization conveyed property to the various railroads; namely, on that date Messrs. Davis, Gallup and Homans conveyed to the Ohio and Kanawha Railway, a corporation of *Ohio*, certain lands and property, and also conveyed other lands and property to the Kanawha and Ohio Railway, then a corporation of West Virginia (see record, page 3).

Prior to the making of the mortgage in suit these two separate corporations were consolidated under the name of the West Virginia Corporation, namely, the Kanawha and Ohio Railway Company. The consolidated corporation had its principal office in Ohio at Columbus, and in West Virginia at Charleston (see record, page 1). This consolidation was made by joint agreement of consolidation under the laws of the two States (see record, page 9). The companies having consolidated, issued the bonds and made the mortgage in suit purporting to cover its lines in the two States, on May 1, 1886 (see record, page 2). Thereafter, the Point Pleasant Bridge Company, which then owned the bridge, on June 25, 1886, made its mortgage to Mr. Simpson, securing various bonds (see record, page 5). On July 2, 1886, Messrs. Davis and Simpson transferred under the agreement (Exhibit B), attached to the bill, to the Trust Company, bonds and stock of the Bridge Company, to be held as additional security for the mortgage bonds (see record, page 28). On July 24, 1886 (see record, pages 58 to 65), an agreement was made between the Columbus, Hocking Valley and Toledo Railway Company and the consolidated corporation for the use of tracks of the former, extending in the State of Ohio, from the City of Gallipolis to the City of Pomeroy, which agreement was continued by the Receiver. On January 1, 1889, default occurred in payment of interest on the mortgage (see bill). On February 18, 1889, the bill for foreclosure was filed in Ohio. On March 4, 1889, ancillary bill was filed in West Virginia, but the Court declined to take such jurisdiction or to appoint Mr. Kelly Receiver (see record, page 106). Thereafter, an original bill was filed for foreclosure in West Virginia, and an application to have Mr. Kelly appointed as Receiver there was denied August 21, 1889.

These facts are necessary to understand the following:

The railroad of the Kanawha and Ohio Railway

Company was not a continuous line extendin through the States of Ohio and West Virginia Originally the Ohio and Kanawha Railway Com pany, a corporation of Ohio, had its line of roa extending in Ohio from a point in the village o Corning, Perry County, through the counties o Perry and Athens, *via* Jacksonville, to a point nea South Shawnee, in Perry County, and through th counties of Perry, Athens, Meigs and Gallia, *vi* Athens and Middleport, to a point on the Ohi River opposite Point Pleasant, West Virginia (se record, page 2). The Kanawha and Ohio Railway Company, however, did not have the franchise o own the line from Middleport to the point opposite Point Pleasant, West Virginia. This was a mos important part of the road, because the Point Pleasant Bridge crossed the Ohio at this point, and thus only could connection be made with the line of the Virginia corporation. For this reason it was very important to have access to a line between Middleport and the Point Pleasant Bridge, and hence the contract was made with the Columbus, Hocking Valley and Toledo Railway Company, shown at page 61, which gave the right to the consolidated corporation to use the tracks of the former railroad from Gallipolis to Pomeroy, thus enabling the consolidated corporation to run its cars between Middleport and Point Pleasant. The agreement for the use of these tracks states that its object is to enable the consolidated corporation to have a continuous line between portions of its line in Ohio and portions in West Virginia (see page 61), and it appears at page 58 that this use of such line was necessary, because it connects the bridge at Point Pleasant with the railroad of the West Virginia corporation, 57 miles long, and also with the line of the Ohio corporation, about 70 miles long.

Neither of the corporations of the two States nor the consolidated corporation owned the bridge across the Ohio River at Point Pleasant. This was

an independent corporation of West Virginia (see pages 5 and 132). The West Virginia corporation, called originally the Kanawha and Ohio Railway Company, had its tracks passing through the counties of Mason, Putnam, Kanawha and Fayette, *via* Charleston, and along the northeasterly bank of the Kanawha River to a point in Fayette County, near the mouth of the Gauley River (see page 2).

It is thus apparent that when the mortgage was foreclosed, the line in the two states was not a continuous one. In Ohio, the Ohio and Kanawha Railway Company, one of the parties to the consolidation, had a line extending from Corning to Middleport, through various counties; thence it ran its cars, by virtue of the agreement with the Columbus, Hocking Valley and Toledo Railway Company, along the banks of the Ohio from Middleport to the Point Pleasant Bridge. This was as far as the Ohio corporation could get and it only owned to Middleport; thence the cars crossed the Point Pleasant Bridge, owned by an independent corporation of West Virginia.

The Kanawha and Ohio Railway Company of West Virginia, one of the parties to the consolidation, had its tracks and road beginning at the Point Pleasant Bridge and extending along the Kanawha River through Charleston into Fayette County.

It is well to note that the mortgage did not cover the bridge and could not do so (see page 4).

It is thus apparent that in spite of the consolidation this was the situation:

A previous corporation, the Ohio Central Railroad Company, had made its mortgage previously on a part of the line in Ohio and this was still outstanding. A subsequent Ohio corporation, the Ohio and Kanawha Railway Company, acquired this property and other property as far as Middleport, and a right of way along the Ohio River to the bridge. An independent corporation of West

Virginia owned the bridge and an independent corporation of West Virginia also owned its line connecting with the bridge.

A Receiver was never appointed in West Virginia of that corporation, the Ohio Court never took custody nor could it take custody of the West Virginia line, and yet, nevertheless, the Ohio Court assumed to sell both the property of the Ohio corporation and the property of the West Virginia corporation and interests in the Bridge Company, although there was no continuity or identity between the line and these two corporations in spite of the consolidation.

The Ohio corporation, called the Ohio and Kanawha, by the consolidation was merged in the West Virginia corporation, namely, the Kanawha and Ohio, which took possession of the various securities of the bridge and all the property of the Ohio corporation and the offices of the merged Company were always in Charleston, West Virginia, which was a place on the line of the road. It will also be noted that there was in the present suit no marshalling of accounts or inventory of property in the State of West Virginia, yet that, nevertheless, although the West Virginia corporations were not parties to the suit, the Court assumed to sell the property in that state and to appoint a Receiver of such property, although the mortgage was not such a continuous one as to give any jurisdiction to the Ohio Court over such foreign property and corporations. It is, of course, not in dispute that the Ohio Court had jurisdiction over any property which existed in the State of Ohio and belonged to the Ohio and Kanawha Railway Company, one of the parties to the consolidation.

THE APPELLANT HEREBY ASSIGNS THE FOLLOWING AS ERRORS COMMITTED BY THE COURT BELOW.

I.—The Court errred in refusing to remove Robert W. Kelly as Receiver.

II.—The Court erred in proceeding to a sale without ascertaining the insolvency of the Railroad, and especially in view of the appellant's offer to take a lease of the Railroad, pay all expenses and divide the net proceeds among the stockholders.

III.—The Court erred in decreeing the sale without first ascertaining the extent, nature, amount and the priorities, with respect to the various prior and subsequent liens upon the mortgaged property.

IV.—The Court erred in directing the sale of the stock and bonds of the Point Pleasant Bridge Company as an entirety with the mortgaged property.

V.—The Court erred in directing a sale of the Bridge securities in the present suit.

VI.—The Court erred in directing a sale without the presence of the Point Pleasant Bridge Company as a party.

VII.—The Court erred in not holding that inasmuch as said Bridge Company was a necessary party and was a corporation of West Virginia, the said Bridge securities could not be disposed of in the present suit brought in Ohio.

VIII.—The Court erred in rendering a decree without making the Ohio Central Railroad Company a party.

IX. The Court erred in directing a sale before the validity of the judgment confessed to the

Kanawha Improvement Company had been determined.

X.—The Court erred in this, that whereas the decree of sale provided that unpaid bonds and coupons should be accepted in payment *pro rata*, the decree confirming the sale nevertheless provided that coupons due January 1st, 1889, be accepted in payment at their face value.

XI.—The Court erred in that the sale occurred without due notice to the appellant.

XII.—The Court erred in this, that it confirmed the sale, whereas it should have set aside the sale, and directed a new sale because of the inadequacy of the price received, owing to want of proper notice and other reasons.

XIII.—The Court erred in not directing a resale in view of the proceedings had, and especially in view of the appellant's offer of an increased price.

XIV.—The Court erred in not affording to the appellant an adequate opportunity to be heard upon the application for confirmation of the sale.

XV.—The Court erred in decreeing a sale, and in confirming the same in view of the fact that under the proceedings as had, neither the appellant nor any other person was able to ascertain what price might be safely bid for the property.

XVI.—The Court erred in confirming the sale, inasmuch as under the proceedings as had the interests of the appellant in said Railway Company were illegally and unlawfully destroyed and rendered worthless.

XVII.—The Court erred in directing a sale and in selling the Railroad property situated in West Virginia.

XVIII.—At the time of the institution of this suit and of the appointment of the receiver there was no cause of action against the Consolidated Company for a foreclosure, under the terms of the mortgage.

XIX.

The court erred in decreeing a foreclosure of the lien of the mortgage and a sale of the property unless the unpaid interest, due January 1, 1889, and July 1, 1889, and the interest to become due January 1, 1890, should be paid within 30 days from the date of the decree, December 5, 1889 (Record folio 303, pages 157 and 158), contrary to the provisions of the mortgage (Record pages 20 and 21; paragraphs of mortgage 8 and 9).

XX.

The court erred in decreeing the payment of compound interest, that is, interest on the interest payments due January 1, 1889, July 1, 1889, and to become due January 1, 1890 (Record pages 157 and 158, folio 303).

modifies this provision.

Where a mortgage provides that the Trustee, after a default for a time specified, shall, upon obtaining a written request, &c., foreclose, a decree made without such written request is invalid.

Chicago Railway *v.* Fosdick, 106 U. S., 47.

See also

Potomac Manufacturing Co. *v.* Evans, 6 S. E. Rep., 2 (Va.).

Wood *v.* Consolidated Electric Co., 36 F. R., 538.

Jones on Corporate Securities, Section 381.

Jones on Mortgages, Chapts. XXI and XXII, Secs. 1367 to 1515.

Kanawha Improvement Company had been determined.

X.—The Court erred in this, that whereas the decree of sale provided that unpaid bonds and coupons should be accepted in payment *pro rata*, the decree confirming the sale nevertheless provided that coupons due January 1st, 1889 h... ment at th... f...

... decreeing a sale, and in ... the same in view of the fact that under the proceedings as had, neither the appellant nor any other person was able to ascertain what price might be safely bid for the property.

XVI.—The Court erred in confirming the sale, inasmuch as under the proceedings as had the interests of the appellant in said Railway Company were illegally and unlawfully destroyed and rendered worthless.

XVII.—The Court erred in directing a sale and in selling the Railroad property situated in West Virginia.

XVIII.—At the time of the institution of this suit and of the appointment of the receiver there was no cause of action against the Consolidated Company for a foreclosure, under the terms of the mortgage.

Point I.

Under the terms of the mortgage the present suit was unauthorized (Error XVIII).

The default occurred in payment of interest on January 1, 1889 (page 6). The suit was brought February 18, 1889.

Under the terms of the bond and mortgage, at paragraph 8, the default must have existed for six months after a demand, and then the trustee must have been requested by one-fourth of the bondholders in interest to foreclose, and by instrument in writing.

An examination of the mortgage will disclose that there is no other part of it which in any way modifies this provision.

Where a mortgage provides that the Trustee, after a default for a time specified, shall, upon obtaining a written request, &c., foreclose, a decree made without such written request is invalid.

Chicago Railway *v.* Fosdick, 106 U. S., 47.

See also

Potomac Manufacturing Co. *v.* Evans, 6 S. E. Rep., 2 (Va.).

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Jones on Corporate Securities, Section 381.

Jones on Mortgages, Chapts. XXI and XXII, Secs. 1367 to 1515.

Point II.

It was error for the Court to allow certain coupons to be paid in full, thus preferring them (Error X).

In the decree fixing the amount due and directing a sale (page 159) bonds and coupons were all to be taken in payment without any priority.

The very mortgage itself provides (page 20) that unpaid bonds and coupons should be paid "without preference of any one bond or interest coupon over any of the others."

The decree confirming the sale (page 208) provides that coupons maturing January 1, 1889, should be accepted at their face value.

This was error, and created an unlawful preference.

It has been held that coupons are not entitled to any priority of payment over the principal of bonds, or over coupons subsequently maturing, unless the mortgage expressly provides for such priority.

Dunham *v.* The Railroad, 1 Wall., 254.
Duncan *v.* Mobile R. R., 3 Woods, 567.
Sewall *v.* Brainerd, 38 Vt., 364.
Miller *v.* The R. R., 40 Vt., 399.
Hodges's Appeal, 84 Pa. St., 359.

It is clear that in this case the mortgage and the decree of sale both provide that there should be no priority.

We submit that the rule laid down in Stevens *v.* The Railroad, 13 Blatch., 412, to the effect that such preference can be allowed, is not law. Furthermore, this case held that the preference could only be allowed when the mortgage says nothing about a *pro rata* distribution. Hence, the present case does not come within the case of Stevens *v.* The Railroad, *supra*, inasmuch as the mortgage in

the present case expressly states that there shall not be any such priority.

Point III.

The Ohio Central Railroad Company should have been a party defendant (Error VIII).

It will be remembered that the Ohio Central Railroad Company formerly owned a part of the property subsequently acquired by the Ohio and Kanawha Railway Company, the Ohio corporation. The Ohio Central Railroad Company had made mortgages on such part of the line, called the Mineral Division Mortgages.

When the present mortgage was foreclosed these mortgages were in existence, and a general foreclosure was attempted to be made, both of the part of the line covered by these mortgages, the remaining portion of the line of the Ohio corporation, and the separate lines and property of the West Virginia corporation.

The nature and extent of the liens of the Mineral Division Mortgages and the parts of the road in Ohio covered by them were not ascertained prior to the sale. It was impossible for a bidder to know these or to make a safe bid on the property.

While it is true that prior mortgages are in some cases not necessary or proper parties, yet when it is necessary to settle the amounts for which prior mortgages are liens, to enable a party to know the amount of money to bid safely, they should be made parties. The complainants should be able to state, or to have fixed, the amount of prior incumbrances.

Richards *v.* The R. R., 1 Hughes, 28, 35.

They should be made parties, if a receiver is prayed for.

Mitlenberger *v.* The R. R., 106 U. S., 286.

This is especially true if the prior mortgage be made by a road other than the consolidated road.

Metropolitan Trust Co. *v.* The R. R., 43 Hun, 521.

And most especially is this necessary when the prior mortgage is upon a part of the general railroad system.

Olyphant *v.* The R. R., 23 F. R., 465.
Jones on Corporate Bonds, Sec. 404, &c.

In the present case we have this exact situation: that the prior mortgages were undetermined as to nature and extent; they were on a part of the railroad system, and it was impossible to ascertain the amount to safely bid for the property.

Point IV.

The decree which directed a sale of railroad property in West Virginia was invalid (Error XVII).

We are aware of the cases in the Supreme Court where a decree in one State is held to bind property in another in cases of railroad corporations where a mortgage has been made covering the whole of a continuous line.

We submit, however, that these cases are not in point, for the reason that although there was an attempt at consolidation, yet under the statute this

did not take effect, and further, that, aside from this, the cases referred to do not apply because, as a matter of fact, there was no continuity between the lines of the Ohio and the West Virginia corporation.

It is stated that the consolidation was made by uniting the Kanawha and Ohio Railway Company of West Virginia with the Ohio and Kanawha Railway Company of Ohio, by a joint agreement of consolidation.

This was clearly done pursuant to statutes of the States of Ohio and West Virginia.

The consolidation occurred prior to May 1, 1886 (page 9), and subsequent to the time when deeds of property were made on January 29th, 1886, by a reorganization committee of the old Ohio Central Railroad Company to the Ohio, and to the West Virginia corporations.

The laws in force at this time in Ohio provided that an Ohio Railroad Company might consolidate its corporate stock with the corporate stock of any adjoining company in another State, organized for like purpose, "to form a continuous line." An agreement must be signed and adopted by the company, and the consolidated company gets no more than the original companies possessed or owned.

Ohio Rev. Stats., Secs. 3380, 3381, 3384.

The acts of West Virginia, Laws of 1877, Chapter 88, Sec. 23—see also Code, Chap. 54, Sec. 53—provided that no corporation should consolidate, except by consent of the Legislature; or where it merged with any *connecting* railroad, within or extending into other States in order to make a *continuous* line, the consolidation be made upon the terms the road should authorize.

In both of these statutes it is clear that it is only where two roads connect, when they are situated in different States, that a consolidation is authorized.

We submit, then, that as the lines were not connecting and continuous, under the statute there was no proper consolidation of these lines, and that therefore the property in West Virginia could not be affected by a decree in Ohio.

We submit further that the property of the Ohio corporation extended only to Middleport, on the Ohio River. There was no bridge at this point, and the only way the cars of this road could cross the Ohio was to cross at Point Pleasant. At the time the mortgage was made it does not appear that the Ohio and Kanawha Railway Company, or the consolidated corporation, had any right, by lease or otherwise, to go over the tracks of the Hocking Valley Railroad between Middleport and Point Pleasant. After the mortgage was made they secured this right by agreement. Even then the consolidated corporation did not own the bridge across the Ohio at Point Pleasant. This was an independent corporation of West Virginia. It thus appears that there was no continuity between the lines of the two corporations.

Consolidation will not necessarily make a corporation a citizen of each State, nor will it necessarily create a new corporation.

Pennsylvania R. R. *v.* St. Louis R. R., 118 U. S., 290.

A corporation having charters in several States and a continuous line of road is a citizen of each, but not so if it operates under a mere license.

Goodlet *v.* The R. R., 122 U. S., 391.
Pacific Company *v.* The R. R., 23 F. R., 565.

Whether by consolidation a dissolution of the old companies occurs or not depends upon the legislative intent.

Central R. R. *v.* Georgia, 92 U. S., 665.

Where corporations of two States are consolidated, nevertheless each of the corporations retains its separate existence for the purposes of suits.

Nashua R. R. *v.* Boston R. R., 136 U. S., 356.

Central Trust Co. *v.* St. Louis Co., 41 F. R., 551.

Racine R. R. *v.* Farmers' Loan and Trust Co., 49 Ill., 331.

It is of course undoubtedly true that a corporation is an inhabitant and citizen only of the State which incorporated it and can be only sued in the District in which it is an inhabitant.

Shaw *v.* The Quincy Mining Co., 145 U. S., 444.

Jones on Corporate Bonds, sec. 350.

Federal Courts have no extra territorial jurisdiction.

Jessup *v.* The R. R., 36 F. R., 735.

Where railroad corporations of two States consolidate, and a company which was merged had previously mortgaged parts of its line, the holders of such mortgage bonds can proceed only against the consolidated company in the State where the mortgage was made, and the Courts of the other State have no jurisdiction.

Eaton R. R. Co. *v.* Hunt, 20 Ind., 457.

See also

Prouty *v.* R. R., 52 N. Y., 363.

Had there been a continuous line and a proper consolidation, it might very well be that, under the decision in Muller *v.* Dows, 94 U. S., 444, the decree of the Ohio Court would bind the West Virginia property. Inasmuch, however, as there was not, and could not have been, a consolidation, inasmuch as the lines of the two roads were not, and

could not be, continuous, we submit that this decision does not apply. It would hardly be contended that a line twenty miles long, in the northern part of Ohio, and a hundred miles away from the Ohio River, could be consolidated with a line in the southern part of West Virginia, a hundred miles away from the Ohio likewise, and we submit that the situation is practically the same here.

To affect the West Virginia property, a suit should have been brought and the property sold in the West Virginia courts.

For like reason we submit that the sale of the securities of the Point Pleasant Bridge Company was invalid in the present suit (errors VI and VII). We shall hereafter discuss another reason why the sale of these securities was invalid; but at this point we submit that, inasmuch as the Bridge Company was a West Virginia corporation, and was a necessary party to a proper disposition of this case, any action by the Ohio Court affecting the securities was invalid. Only the Courts of West Virginia had jurisdiction.

Point V.

It was error to sell the bonds and stock of the Point Pleasant Bridge Company as an entirety with the mortgaged property (Errors IV and V).

The consolidated company had created a fund for the payment of the mortgage bonds, namely, property which was conveyed to the trustee by the mortgage.

Mr. Davis and others thereafter, by their deed of July 2, 1886, provided an additional fund to pay these mortgage bonds. The very deed itself, Ex-

hibit B, attached to the bill, shows that these bonds and stock represented practically all the property of the Bridge Company, and were to be held as security "in addition to the security of the mortgage."

We submit that it is an elementary rule that where a creditor has two funds, one the principal fund and the second a fund in the nature of a guarantee or additional security, he should first exhaust the original fund before proceeding against the additional security.

The mortgage should have been at first foreclosed as against all of the mortgaged property. If any deficiency then existed, this could have been paid by a collection of a portion of the Bridge bonds and by a sale possibly of a portion of the Bridge stock.

At any event it might not have been necessary to have sacrificed the whole property in the bridge. The report of the Master shows (page 152) that only 1,160 mortgage bonds were outstanding and only two installments of interest and a part of one other. The total indebtedness was less than $1,260,000. It did not appear that the Bridge Company was insolvent. It did appear that bonds of a solvent corporation, or presumably solvent because it is not alleged to be insolvent, were held to pay this indebtedness, in value one million dollars, and stock in value $998,000 (see page 28). Even assuming that the mortgaged property alone sold for but $400,000, there would still be a surplus of the Bridge bonds and stock after satisfying any deficiency.

However this may be, we submit that the original security should have first been exhausted.

Jones on Mtgs., Sec. 875. 1628, &c.
Storey Eq. Jur. Ed. (1873), Sec. 633–645c.
Pomeroy's Eq. Jur., Sec. 410, 411.

It has been held that where a man holds mortgage bonds as collateral security merely, when a foreclosure is had he should not receive the full amount of the bonds, but should only receive the amount of his debt and interest.

Morton *v.* New Orleans Co., 79 Ala., 590, 621.

See also

Ackerson *v.* The R. R., 28 N. J., Eq. 542.
Jessup *v.* City Bank, 14 Wis., 331.
Rice's Appeal, 79 Pa. St., 168.
Peck *v.* R. R., 59 How. Pract., N. Y., 419.

If a person had held mortgage bonds of the Kanawha and Ohio Railway Company, as collateral security, he could have received only his debt and interest. Now, in the present case the trustee, in effect, held the Bridge securities as additional and collateral security. Out of these, then, on the same principle, the trustee should only have realized the amount of the debt and interest, and that would have been the deficiency arising after the primary fund, the mortgaged property, had been exhausted.

It is the right of a surety who has pledged his property with the property of the principal, to have the property of the principal sold and applied first to the payment of the debt.

Vartie *v.* Underwood, 18 Barb., 561.

See also

Wright *v.* Austin, 56 Barb., 13.

We submit that the ordinary rules respecting guarantors and sureties should have applied to this case, and that a sale of the Bridge securities as an entirety with the mortgaged property was unauthorized. The owner of the Bridge securities was irreparably damaged, and his property absolutely lost.

It is clear that, even under a Railway mortgage, property subsequently acquired by the Railroad is not covered by the mortgage unless the mortgage specifically refers to such after-acquired property.

See

Jones on Corporate Bonds, Secs. 114 to 120;
Walsh *v.* Barton, 24 Ohio St., 28;
Seymour *v.* The R. R., 25 Barb., 284;
Farmers' Loan and Trust Co. *v.* The Bank, 11 Wis., 207;
Same *v.* Cary, 13 Wis., 110;
Same *v.* The Bank, 15 Wis., 424;
Brainerd *v.* Peck, 34 Vt., 496.

The mortgage did not refer to the Bridge securities as property to be subsequently acquired. It did refer to them as property to be held as additional security, and to be conveyed by third parties.

Nevertheless, although it was not after-acquired property, was not referred to in the mortgage, and was in the nature of collateral, a sale of the whole took place with the mortgaged property.

Point VI.

The Court erred in directing the sale and in confirming the sale.

The nature and extent of prior liens and their amounts and priorities should have first been ascertained (error No. III).

While in certain cases it may be wise to direct a sale without doing this, we submit that the present case is not such a case.

A sale should never be ordered if the nature and character of prior liens is uncertain.

Jerome *v.* McCarter, 94 U. S., 734.
Sutherland *v.* Lake Superior Ship Canal, 1 Central Law Journal, 127.

It was necessary in the present case, to enable a purchaser to bid intelligently, to have ascertained precisely the situation of the property.

The very upset price specified in the decree for sale could not be properly determined. It has been held that such upset price should cover costs, allowances, receiver's certificates and interest, liens prior to the mortgage bonds, amounts diverted from earnings, and all undetermined claims. These should be settled before sale.

Blair *v.* The Railroad, 25 Fed. Rep., 232.

In the present case there existed the indefinite liens of the Mineral Division mortgages, and the indefinite amounts of the receiver's obligations, with their priorities. These had not been authorized by consent of all the bondholders, and, therefore, it was a question whether or not they were valid at all, as being liens prior to the mortgage.

Jones on Corporate Bonds, 559, &c.

The Court should further have waited until the validity of the judgment confessed in West Virginia to the Kanawha Improvement Company had been determined (error No. IX). This judgment in effect gave a priority to such company. The circumstances surrounding it were suspicious. If the jurisdiction of the Receiver extended into West Virginia, then it was a corporate act after the Company was in the hands of a receiver and without consent of the Court. It was a matter which was pending in a court of concurrent jurisdiction. It

appears from the record that the proposed purchasers under the proposed reorganization agreement owned or controlled this judgment (see record, page 198). Presumably it was confessed and secured in their interest.

We submit further that the Court below should have determined the question whether or not the Kanawha and Ohio Railroad Company was actually insolvent (error No. II).

It is, of course, clear that if the road was not in default, and if it was not as a fact insolvent, the exercise by the Court of the harsh power of foreclosure was greatly to the damage and injury of the stockholders of the road. It was charged by Mr. Davis in his petitions that the road was not insolvent. He offered to take a lease of the road, pay all the interest on the bonds and divide the net profits among the stockholders. This was sufficient to have put the Court on inquiry, and the question of fact should have been determined. We submit also that it was error under the circumstances to refuse to remove the Receiver (error No. I). Grave charges were made against him, and these were ignored by the Court. Furthermore, something more than default in payment of interest should have been shown to authorize the appointment of a receiver. The insolvency of the road should have been ascertained.

Taylor *v.* The Railroad, 14 Phila., 451.
Jones on Corp. Bonds, Sec. 430.

Also, that without such appointment the Company would suffer erreparable loss.

Milwaukee Railroad *v.* Soutter, 2 Wall., 510, 523.

This case holds that it is not always a matter of discretion to appoint a receiver. Certainly a receiver should never be appointed until the right of foreclosure exists.

American Trust Company *v.* The Railroad, 29 Fed. Rep., 416.

We submit that there was no right of foreclosure at the start; that the Company was not shown to be insolvent by proper proof; that there was no occasion for the appointment of a receiver; and that the action of the Court in forcing a sale before these matters were ascertained, and ignoring the offer of Mr. Davis, a responsible person, to lease the road, were grave errors.

The Receiver was in a position to do great damage to the railroad property. While he had no extra territorial jurisdiction in West Virginia (Booth *v.* Clark, 17 Howard, 322), yet, nevertheless, he was in a position to create preferred liens, or liens which the courts might hold to be preferred. His character had been questioned, and yet no investigation of this was made.

We submit further that the Receiver's certificates issued under order of the Court were invalid. The Receiver proceeded without the consent of all the bondholders. Mr. Davis did not consent, as appears by the record, and as against him, the Receiver's certificates were invalid within the rules laid down in the following cases:

Union Trust Co. *v.* The Railroad, 117 U. S., 434, 456.
Roht *v.* Attrill, 106 N. Y., 423.
Jerome *v.* McCarter, 94 U. S., 734.
Investment Company *v.* The Railroad, 36 Fed. Rep., 48.
Hervey *v.* The Railroad, 28 Fed. Rep., 169, 176.
Jones on Corp. Bonds, Ch. XVI.

And yet the Receiver was confirmed in his possession, assumed to act in West Virginia, issued a large amount of receiver's certificates, and the Court, having failed to ascertain prior liens, wholly

ignored the various requests or issues of fact tendered by the appellant Davis in his various petitions, and directed and confirmed the sale.

Point VII.

The Court was in error in not setting aside the sale and ordering a new one.

We submit that there was no proper notice of sale (error No. XI).

It will be remembered that the Master had power to fix the time of sale and to adjourn it without notice. The proceedings he took resulted in the fact that competition was prevented and an inadequate price realized.

Mr. Davis, although he requested proper notice of the confirmation of the sale, did not receive this (error No. XIV).

These proceedings resulted in a price grossly inadequate (error No. XII). No one, who, by good fortune, knew about the time of sale, was in a position to bid intelligently (error No. XV).

The Purchasing Committee, it appears, owned or controlled (see pages 198 and 199) various bonds and coupons, the fraudulent judgment, and other claims, and all Receiver's certificates. They were in a position, having knowledge of all liens of every kind, to make an intelligent bid, but no one else could do so.

That the price was inadequate appears from the fact that Mr. Davis, a responsible man, who owned over one hundred thousand dollars in the bonds and two million dollars of the stock, who had been connected with the property from the beginning, filed a formal offer to pay 10% more than was bid (error No. XIII).

While it may be true that mere inadequacy of price will not make a sale invalid, if it be otherwise fair, yet, under the circumstances here detailed, the sale should have been set aside.

Turner *v.* The Railroad, 8 Biss., 380;
Barnes *v.* The Chicago Railroad, 122 U. S., 1;
James *v.* The Railroad, 6 Wall., 752;
Farmers' Loan and Trust Company *v.* Newman, 127 U. S., 649;

Where a sale is improper or irregular, an order for a resale must be made.

Farmers' Loan and Trust Company *v.* Newman, 127 U. S., 649.

Under the circumstances the sale was irregular and improper, the price was inadequate, proper competition was prevented, and the purchase was altogether suspicious.

Point VIII.

Under the proceedings as had the interests of the appellant in the railroad company were wholly destroyed and rendered worthless (error XVI).

It appers that Mr. Davis was the owner of more than two million dollars' worth of the stock of the Railroad (see page 108), and also of more than one one hundred thousand dollars of the bonds (see page 132). He held a position of trust and influence previously in the original railroad companies, he had offered to lease the Railroad for twenty years, he had offered to pay more than the

purchase price, and he was vitally interested in protecting this large amount of property.

Under the proceedings as had, he was entirely ignored. His petition for an appeal was at first denied until Mr. Justice Harlan of this Court granted it. He did not receive adequate notice of the sale or of its confirmation. The various issues of fact which he tendered touching the solvency of the Railroad, the impropriety of Mr. Kelly being Receiver, the fraudulent judgment, and the various other matters set forth in his petitions and affidavits were all decided against him or ignored.

Mr. Davis has in no way consented to the reorganization nor has he in any way waived any of his rights. It is claimed at page 199 that Mr. Davis deposited 70 of his bonds under the Reorganization Agreement. Even were this so, it appears that he has over thirty thousand dollars of bonds additional and over two million dollars of stock which he still holds and which has not been in any way yielded to the reorganization. It was proper for Mr. Davis to refuse to have anything more to do with this reorganization, as soon as he discovered these irregularities.

By the proceedings as had, Mr. Davis's large interests were practically wiped out and rendered worthless.

He has appealed from the decree directing a sale and also from the decree of confirmation.

Both of these appeals were from final decrees.

Milwaukee Railroad *v.* Soutter, 2 Wall., 440;
Blossom *v.* The Railroad, 1 Wall., 655;
Hinckley *v.* The Railroad, 94 U. S., 467;
Sage *v.* The Railroad, 96 U. S., 712.

Nothing is more certain than this, that trustees

who represent bondholders should act in all respects fairly and within their powers.

Campbell *v.* The Railroad, 1 Woods, 368.

We submit that the trustee in this case has acted beyond the scope of its powers and in hostility to the interests of the beneficiaries.

There has never been any marshalling of assets nor apportionment of claims with respect to the West Virginia Railroad property and creditors there. In fact, Mr. Justice Harlan in the case of the Mercantile Trust Company *v.* The Kanawha and Ohio Railway Company, 39 Fed. Rep., 337, refused recognition to the Ohio Receiver in West Virginia.

By reason of the failure of the Court to determine prior liens, various litigations have arisen touching this property.

See Mercantile Trust Company *v.* Kanawha and Ohio Railway Company, 50 Fed. Rep., 874; reversed by the Court of Appeals in 58 Fed. Rep., 6.

It is clear that the Ohio Court acquired no jurisdiction by the appointment of this Receiver over the property in West Virginia.

Booth *v.* Clark, 17 Howard, 322.
Mercantile Trust Company *v.* Kanawha and Ohio Railway Company, 39 Fed. Rep., 337, 340.
Atkins *v.* The Railroad, 29 Fed. Rep., 161.

An examination of the record will disclose how many and how various were the liens claimed to be prior to those of the mortgage. The priorities were conflicting; the whole matter was one of confusion. Orderly proceedings should have been taken to determine these; the jurisdiction of the West Virginia Court should have been invoked in that State and the interests of the bondholders and stockholders should have been considered.

On the contrary, we submit that the Ohio Court proceeded without jurisdiction and in defiance of the rights of the appellant, and that the whole of the record discloses the fact that the appellant's large and valuable interests in this large property were wantonly sacrificed by the trustee and were wiped out by the Court without due process of law.

Point IX.

The decree directing the sale, as well as the decree confirming the same, should be reversed, with costs.

WALTER S. LOGAN,
CHARLES W. DEMOND,
Of Counsel for Appellant.

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Office Supreme Court, U. S.
FILED
MAR 22 1894
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1893.

ERWIN DAVIS, *Appellant*,
vs.
THE MERCANTILE TRUST CO., Trustee, *Appellee*.

Appellant's Supplemental Brief.

Additional Point I.—Assignments of error XIX and XX are well taken, and the decree should be reversed accordingly, even if it is not reversed on the grounds specified in assignment of error XVIII and argued in point 1 of the original brief, as we insist it should be.

These two assignments of error are as follows:

"XIX. The court erred in decreeing a foreclosure of the lien of the mortgage, and the sale of the property, unless the unpaid interest due January 1st, 1889, and July 1st, 1889, and the interest to become due January 1st, 1890, with interest on all the interest up to the date of payment should be paid within thirty days from the date of the decree, December 5th, 1889, contrary to the provisions of the mortgage.

"XX. The court erred in providing in the decree for compound interest, that is, interest on the interest payments up to the date of payment." (See appellant's original brief, page 33.)

The mortgage which is a part of the amended complaint (Record, page 79, fol. 147), and of the decree (Re-

cord, page 154, fol. 297) provides (Record, page 20, par. 8th), that the lien of the mortgage shall be foreclosed if default in the payment of interest continues for six months, and if one-fourth in interest of the holders of the bonds request in writing that the trustee shall foreclose and (Record, pages 20 and 21, par. 9th), upon the request of any holder or holders of the bonds, in writing, if the default shall have continued for one year.

As the mortgage itself specifies the conditions under which it may be foreclosed, those conditions are a part of the contract and the mortgage can not be foreclosed except in pursuance of those conditions. (See cases cited under point 1, of the original brief, page 33.)

The decree (Record, pages 157 and 158, fol. 103) provides that "the lien of the mortgage" shall be foreclosed, and the property sold unless the interest due January 1, 1889, and July 1, 1889, and the interest to become due January 1, 1890, together with interest on this interest from those dates, and "also a sum of money (without specifying the amount) sufficient to defray the costs of this suit, including allowances for counsel to be taxed and fixed," be paid within thirty days from the date of the decree, December 5, 1889, without any request to the trustee from any one having been made.

It may be that on January 4th, 1890, the last day allowed by the decree to redeem, Mr. Davis, or some one else would be ready and able to pay the interest due January 1st, 1889, and that due July 1st, 1889, but it would be of no avail unless the interest also due January 1st, 1890, and interest on this interest to date of payment, and this indefinite sum of money "sufficient to defray the costs of this suit" was also paid.

The mortgage itself was the charter of the Trustee and the Court, and it seems plainly error to make the conditions of the decree harder than those of the contract, and

to fail to give as much time to redeem as the contract gives to pay in the first instance.

This court, in Clark *v.* Reyburn, 8 Wallace, 322, say:

"As between the parties to the mortgage the law protects it with jealous vigilance." And "the right to redeem is a favorite equity, and will not be taken away except upon a strict compliance with the steps necessary to divest it."

The judgment in Clark against Reyburn was reversed, although the decree was taken *pro confesso* against the parties appealing, and this court in Chicago and Vincennes R. R. Co., 106 U. S., 71, say that the judgment would have been the same if it had been a decree of foreclosure and sale instead of strict foreclosure.

In Clark against Reyburn the decree was reversed because the amount to be paid on redemption was not fixed, and the court say that the result would have been the same if it had been fixed not at too large a sum.

In this case no rights of innocent purchasers intervene. The property was bought in at the sale by a re-organization committee in the interest of people already having their investments in the property, and having full knowledge of all the proceedings in this case and of these appeals. It does not appear that any outside capital has been invested. (Record, pages 198 to 205.)

At any rate, if there was error below which was to the prejudice of our rights, we are entitled to a reversal, and to be put back as near as we can be, in the situation in which we ought to have been placed in the beginning.

Additional Point II.—In view of all circumstances the court should have refused to confirm the sale, and to have ordered a re-sale. (Assignment of error 13, page 32; original brief.)

Mr. Davis, at the beginning, denies the insolvency of the railroad company; offers to take a lease for twenty years, and to pay during that time all the interest on the bonds and all the expenses of the property, and to divide the profits beyond this among the stockholders. (Record, page 109.)

He then asks (Record, pages 128 to 139), that prior liens may be first ascertained, and also the amount due on the receiver's certificate, so that if there is to be a sale of the property he may bid upon it intelligently. That is refused.

When the property is sold it is insufficiently advertised and by the express provision of the decree, the commissioner may adjourn the sale at his own pleasure without notice to any one by a simple announcement at the time of the sale; so that, as Mr. Davis says (Record, pages 204 and 205), he was unable to make arrangements to buy in the property; or to intelligently bid upon it in all this state of uncertainty, but he offers to pay 10 per cent. more than the property was actually sold for (Record, page 205). Mr. Davis is an entirely responsible man, and it is evident that the property was sold for a grossly inadequate price.

Under such circumstances I submit that the sale should not have been confirmed, and that a re-sale should have been ordered.

Additional Point III.—There can be no question about the standing of Mr. Davis as an appellant herein, and about his right to appeal. Williams *v.* Morgan, 111 U. S., 684.

Respectfully submitted.

WALTER S. LOGAN,
Counsel for Appellant.

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Respectfully submitted.

WALTER S. LOGAN,
Counsel for Appellant.

Office Supreme Court U. S.
FILED.
MAR 26 1894
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Supreme Court of the United States.

OCTOBER TERM, 1893.

ERWIN DAVIS, Appellant,
v.
THE MERCANTILE TRUST COMPANY,
Trustee, Appellee.

Appellant's Supplemental Brief No. 2.

I. The mortgage, if it could be foreclosed at all, could be foreclosed only for actual *default* in payment of interest, and only to the extent of such actual *default*. (Chicago & Vincennes R. R. Co. *v.* Fosdick, 106 U. S., 47.) The principal was not due by its terms until January 1, 1936 (Record, pages 10 and 11), and it only became due because of default in payment of interest, after such default had continued for one year, one-fourth in interest of the holders of the bonds had requested the trustee in writing to formally declare that it elected that the principal should become due, and the trustee, in accordance with such request, had made such formal election and declaration. (Record, page 18, par. V.) This had not been done, and could not have been done, because one year had not elapsed since the first default, and because one-fourth in interest of the holders of the bonds had not made such a request.

The bond provided (Record, page 10) that the interest should be payable "at the office or agency of the com-

pany in the city of New York," and "on presentation and surrender of the proper coupons." There could be no *default* in the payment of any interest until the coupon representing such interest was presented for payment at the office of the company in the city of New York and payment refused. The company was under no obligations to seek out the holder of bonds, carry him his money, and ask for his coupons.

The original bill alleges (Record, page 6, par. IX), "that since said 1st day of January, 1889, *divers* of said interest warrants or coupons due on that day have been presented at the office or agency of the said, The Kanawha & Ohio Railway Company in the City of New York, and payment thereof demanded and refused by said company, and said company has in this respect made default and such default still continues." And that the company "has thus failed to pay interest on *some* of said bonds."

The amended bill (Record, page 81, par. IX), alleges "that since said 1st day of January, 1889, and prior to the commencement of this suit, *seven hundred* or more of said interest warrants or coupons due on that day *amounting to the sum of $21,000* or more have been presented at the office or agency of the said, The Kanawha & Ohio Railway Company in the City of New York, and payment thereof has been demanded and refused by said company, and said company has in this respect made default, and such default still continues." And that the company "has thus failed to pay interest on *some* of said bonds."

There is no allegation that any of the coupons due July 1, 1889, have been presented for payment, or that payment has been refused, although the amended bill was not filed until July 24, 1889. (Record, page 76.) And, of course, there could be no allegation as to the presentation of, and refusal to pay, coupons to become due January 1, 1890.

The failure to answer, and the order that "the bill be taken *pro confesso*" (Record, pages 110 and 111), certainly can not be considered as an admission of anything more than was formally alleged in the bill of complaint.

No testimony was taken or evidence offered in support of the complainant's case except as follows:

On December 5th, 1889, it was ordered (Record, pages 151 and 152), that it be referred to B. R. Cowen, who was appointed Special Master for the purpose, to inquire and report:

"(1) What amount of bonds of the Kanawha & Ohio Railway Company secured by the mortgage mentioned in said amended bill of complaint, are now outstanding.

"(2) What amount of the interest upon said bonds due January 1st, 1889, *is unpaid*, and what amount of interest upon said bonds due July 1st, 1889, *is unpaid*, and what amount of interest upon said bond *will become due* January 1st, 1890."

On the same day Mr. Cowen makes his report (Record, pages 152 and 153).

"That he has been attended by counsel for the complainant herein, and by R. T. H. Halday, a director of defendant company, a witness produced in behalf of the complainant, and that he has taken the testimony offered, and finds and reports that eleven hundred and sixty of the bonds of the Kanawha & Ohio Railway Co. secured by the mortgage mentioned in the amended bill of complaint herein, being for the principal sum in the aggregate of eleven hundred and sixty thousand dollars, are now outstanding; that of the interest upon said bonds due January 1, 1889, the sum of twenty-five thousand six hundred and eighty dellars *is unpaid*; that of the interest upon said bonds due July 1, 1889, the sum of thirty-four thousand eight hundred dollars *is unpaid*, and that the sum of thirty-four thousand eight hundred dollars will become due as the interest upon said bonds on January 1, 1890."

It will be noticed that the Special Master does not find that any of the coupons representing interest due January 1, 1889, or July 1, 1889, have been presented for payment, or that payment has been demanded or refused, and, of course, he could not report that the coupons due January 1, 1890, would be presented for payment or that payment would be refused.

He simply reports that the interest due January and July, 1889, has not been paid. *But simple non-payment does not constitute default; it must be non-payment following presentation and demand.*

The reference to the Special Master, the report by him, and the decree of the court based thereon, all bear the same date, December 5, 1889.

The court finds (Record, page 157) "that since the 1st day of 1889, and before the filing of the original bill herein seven hundred and thirty of said interest warrants, falling due on January 1, 1889, were duly presented at the office or agency of said railway company in the city of New York, and payment thereof was demanded and refused by said company," but finds no other presentation, demand, or refusal, to pay coupons or interest.

The principal had not become due and no proceedings had been taken, or could be taken at that time, to make it become due. The defendant mortgagor had a right to redeem on payment at the most of interest in actual *default*, and there could have been no default except in the cases where the coupons had been actually presented for payment and payment refused. The most that had been claimed in the bill of complaint to be in default was seven hundred of these thirty-dollar coupons or twenty-one thousand dollars in all. The most that was found by the court to be in default was seven hundred and thirty of these same coupons, or twenty-one thousand nine hundred dollars in all.

There was, therefore, no allegations of the bill of complaint, or finding of the court, which justified the conclusion that more than $21,900 of interest was in default.

The defendant mortgagor, had, therefore, a right to redeem on paying the amount so in default, not to exceed, at the most, $21,900.

Mr. Davis being interested as a large stockholder and bondholder in the mortgagor company and its property, and having been allowed to intervene (Record, page 117), had the same right to redeem for the company that the company had to redeem for itself and on the same terms, that is, he had a right to pay this money himself if he thought his interest in the company was sufficient to justify it, or to ask the other stockholders and bondholders to join with him if they thought their interests justified their doing so, to save the property of the company, in which he was so largely interested, from foreclosure and sale. The decree fully recognizes Mr. Davis's right to redeem on the same terms on which the company may redeem, for it provides (Record, page 157), "that the redemption may be made by the defendant the Kanawha & Ohio Railway Company, and one or more of the defendants, or some person orpersons for it or them."

Mr. Davis, therefore, had a right to redeem on payment of $21,000, at the most, to complainant.

Instead, however, of allowing him to redeem for this sum, the decree (Record, pages 157 and 158), requires payment of *all* the interest due January 1, 1889, $25,680, $3,780 more than the court had found was in default, and $4,680 more than the amended bill of complaint had claimed to be in default; all the interest due July 1, 1889, $34,800, although none of it was alleged or found to be in default (it was not claimed that a coupon had been presented or refused); all the interest to become due

January 1, 1890, whether the holders of the coupons should desire the payment of their interest, and present their coupons or not; compound interest on all these interest payments; and an indefinite sum of money, "sufficient to defray the costs of the suit."

This we claim was error, and so assign (Chicago & Vincennes R. R. Co. *v.* Fosdick, 106 U. S., 47).

We should have been allowed to redeem on payment of the amount claimed and found to be in actual default, at the most	$21,900
The decree allowed us to redeem only on payment of all the interest due January 1, 1889, of which $3,780 was not claimed to be in default . .	$25,680
Interest due July 1, 1889, none of which had been shown to be in default	34,800
Interest to become due January 1, 1890, as to which the question of default was merely speculative	34,800
Compound interest, or interest on interest, for which I submit there is no authority of law.	2,300
Total	$107,580
Amount required to be paid above amount shown or found to be in default	85,680

Besides an indefinite amount, "sufficient to defray the costs of this suit, including allowances to counsel."

This court, in Chicago & Vincennes R. R. Co. *v.* Fosdick, *supra*, a case very similar to ours, say:

"It is obvious that the finding of the amount due for non-payment of which according to the terms of the decree the mortgaged property is ordered to be sold, is the

foundation of the right of the mortgagee further to proceed, *and a substantial error in that finding must on appeal vitiate all subsequent proceedings.* Unlike a calculable error in the amount of a personal judgment which may be cured by a remittitur, it is otherwise incurable, for it is an illegal exaction made as a condition for preserving the rights of the mortgagor in his estate, and if executed, depriving him wrongfully of it. It propagates itself through all subsequent stages of the cause. The right to redeem is a favorite equity and will not be taken away except upon a strict compliance with the steps necessary to divest it. * * *

"It becomes then of the first importance to ascertain whether the decree of foreclosure and sale in the present case, found due and required to be paid as a condition of exercising the right to redeem, a larger sum than was then due."

Mr. Davis may appeal, on the ground that the decree required too large a sum to be paid as a condition of exercising a right to redeem, as well as may the mortgagor defendant.

He was allowed to intervene (Record, page 117) "for the protection of his interests as bondholder and stockholder of the Kanawha & Ohio Ry. Co.," and to protect such interests he might well conclude that it was necessary to pay the amount required to save the company he was so largely interested in from losing all its property by foreclosure and sale.

If the decree was to the prejudice of the defendant mortgagor it was equally to his prejudice.

Williams *v.* Morgan, 111 U. S. 684.

The appeal may be taken notwithstanding the decree was entered on the bill taken *pro confesso*.

Clark *v.* Reyburn, 8 Wallace, 322.
Chicago & Vincennes R. R. Co. *v.* Fosdick, *supra.*

II. The mortgage provides (Record, foot of page 13, and top of page 14), that the conveyance to the trustee is, "in trust nevertheless for the persons who shall hold bonds and interest coupons aforesaid or any or either of them, and for the enforcing the payment thereof when payable in accordance with the true intent and meaning of the stipulations of this deed, and of said bonds, and of said interest coupons, and *without preference* of any of said bonds over any of the others thereof by reason of priority in the time of issue on negotiations thereof, *or otherwise howsoever.*"

Independently of this provision in the contract the maxim applies, "Equality is Equity," and the law would require the payments to be "without preference" if the parties had neglected so to expressly provide.

The decree of sale (Record, page 159) provides for the payment of $50,000 of the purchase money in cash and "that the balance of said purchase price shall be paid in money or in first mortgage bonds of the Kanawha & Ohio Railway Company, and unpaid and over-due coupons and that such bonds and coupons be taken at such price or value as the holders thereof would have been entitled to receive on a distribution of the proceeds of sale in case the entire amount of the bid had been paid in money." There is no suggestion here in the *original* decree about giving any of the bonds or coupons a preference over any others.

But after the sale is made the purchasers ask to have certain coupons they hold taken at their full face value while all the other bonds and coupons must be content with about 30 cents on the dollar of their face value; and the decree confirming the sale recites (Record, page 208) that the said purchasers tender in payment among other things, nine coupons attached to bonds, and seven hundred and sixty-eight detached coupons, seven hundred

and seventy-seven in all, due January 1, 1889, of $30 each, in all $23,310 face value, and the court ordered:

"That said coupons representing interest on said bonds maturing January 1, 1889, be, and they are hereby accepted on account of said purchase price at the face value thereof."

This gives the coupons of this class, held by the purchasers, $23,310, out of the total amount of $25,680 of the same class unpaid, a preference over the same class of coupons held by others than these purchasers and over the bonds and all other classes of coupons held by any one else, which preference is contrary alike to the provisions of the mortgage, to the original decree, and to equity and justice.

The fortunate purchasers get 100 cents on the dollar for these coupons they hold. Every one else, whether holding the same class of coupons, or other bonds and coupons, secured in the same way, by the same mortgage, get only about 30 per cent.

I submit that this provision of the decree (Record, pages 207 to 209) was erroneous and that it should be corrected.

Mr. Davis certainly has a right to appeal from it, for it depletes still more the already far too small fund which is all he has left to rely upon for any payment on account of his bonds. It is generosity to the purchasers at his expense.

III. I submit that both decrees, the decree of sale, and the decree confirming the sale, were oppressive to this appellant, and calculated to deprive him of his fair equities and just rights.

Counsel for the Trustee of the bondholders, and for the Railway Company mortgagor seem to have worked in en-

tire harmony to cut off and wipe out the equity in the railroad company's property (Mr. Davis held over $100,000 of the bonds and $2,000,000 of the stock, Record, pages 107 and 108) in the quickest and most cavalier manner possible, and to cause a sale of the property to be made under such circumstances and conditions as would be sure to leave nothing for the stockholders and as little as possible for the bondholders.

The original bill of complaint of the Mercantile Trust Company is sworn to February 16 (Record, page 9) and filed February 18 (Record, page 1); the Kanawha & Ohio Ry. Co. voluntarily appear February 19 (Record, page 32); the president of the railroad company is appointed receiver by consent of all the counsel, February 20 (Record, pages 32 and 33) after having first confessed judgment very summarily against his company in West Virginia for a large amount under very strange circumstances (Record, pages 126 to 139); the amended bill of complaint of the trustee is sworn to July 16 by the secretary of the trust company, and the railroad company consents to it being filed, waives issuance of process, and instructs the clerk to enter its appearance on July 19 (Record, page 84); Mr. Davis, a very large stockholder and bondholder and a perfectly responsible and well-qualified man, in order to redeem the management and save the property, offers to take a lease of the railroad and pay all the expenses of operation and all the interest on all the bonds for twenty years and divide any profits above this among the stockholders (Record, pages 105 to 109), but the trustee and the railroad company do not want the property saved that way, and prefer to have it sold out and to pay the stockholders nothing and the bondholders only about 30 cents on the dollar.

The railroad company makes no defense to the suit and allows the bill to be taken *pro confesso* against them (Re-

cord, pages 110,111). Mr. Davis, to protect his rights, has to come in, take the burden the railroad company should itself have borne, and intervene (Record, page 117). When they desire to enter this decree *pro confesso* counsel consent to a reference to the clerk of the court as Special Master, and an order of reference is made, the Master reports, and the decree is entered, all the same day (Record, pages 151 to 153). The decree allows the Commissioner who was appointed to sell the property to adjourn the sale from time to time in his absolute discretion without notice or warning except his announcement at the time and place of sale (Record, pages 158, 204 and 205), so that if Mr. Davis is present and likely to run the price up it can be adjourned until he is tired out, but if at any time he happens to be absent, it can be sold at a price to suit the most fastidious buyer. The property representing an investment of many millions is given less advertisement than we usually give in New York to a sale of a $10,000 house (Record, pages 191 to 197, and 204 and 205). Mr. Davis chances to be absent one day, and the property is sold at a grossly and concededly inadequate price (Record, pages 192, 204, and 205) to a committee representing some of the parties in interest who are in hostility to Mr. Davis; Mr. Davis when he hears of the sale offers to bid 10 per cent., $50,000, in addition to the price it brought in his absence, if a re-sale is had, and his whole vast investment and interest in the property stands as security for the offer, but in spite of all this a re-sale is refused, and the first sale, made in Mr. Davis's absence, confirmed; and then the purchasers are allowed to put in their January, 1859, coupons in payment, *at their full face value*, although if they shared equally with the same or like coupons owned by other parties, or with other bonds and coupons owned by any one, they would not be worth more than 30 cents on the dollar (Record, page

208); and all that Mr. Davis has left out of his large investment, is a chance to come in to a hostile reorganization scheme, or lose almost the whole of his money.

I submit that under all these circumstances it was error to confirm the sale and that the decree of confirmation should be reversed.

Mr. Davis can certainly appeal from this decree confirming the sale and refusing to direct a re-sale, for he is interested most vitally in having the property bring the highest possible price, so that his proportionate share may be as great as possible.

WALTER S. LOGAN,
Counsel for Appellant.

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JAMES H. McKENNEY
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Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 320.

ERWIN DAVIS,
Appellant,

against

THE MERCANTILE TRUST COMPANY, Trustee,
Appellee.

BRIEF FOR APPELLEE.

THOMAS THACHER,
Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States.

OCTOBER TERM, 1893—TERM NO. 320.

ERWIN DAVIS,
Appellant,

AGAINST

THE MERCANTILE TRUST COMPANY,
Trustee,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE MERCANTILE TRUST COMPANY, TRUSTEE, APPELLEE.

Statement.

The cause in which this appeal is taken was brought and prosecuted by the Mercantile Trust Company, trustee, for the foreclosure of a mortgage and agreement of pledge of the Kanawha and Ohio Railway Company (Bill of Complaint, Record, p. 1; said Mortgage, Record, p. 9; said Agreement, Record, p. 28; Amended Bill, Record, p. 76). The amended bill was taken *pro-confesso* against said railway company on ~~November 8th~~ Oct. 30, 1889 (Record, p. 110). *Thereafter*, on November 13th, 1889, Erwin Davis, the appellant herein, having previously applied as a bondholder and

stockholder of said railway company for the removal of the Receiver theretofore appointed and the appointment of another in his stead (this application being denied) was "permitted to intervene" and to "have liberty *to be heard upon any and all proceedings* herein for the protection *of his interests* as bondholder and stockholder of the Kanawha and Ohio Railway Company" (Record, p. 117). He filed an intervening petition on the 5th day of December, 1889 (Record, p. 128), and on the same day a motion was made to strike this petition from the files (see Record, p. 139).

On the same day, December 5, 1889, a decree of sale was entered (Record, p. 153).

An appeal from this decree was subsequently allowed to the appellant by Mr. Justice HARLAN, not to operate as a supersedeas except upon a condition which was not complied with (Record, p. 185 *et seq.*).

The railroad and property of the Kanawha and Ohio Railway Company was sold, pursuant to said decree of sale, in the manner and upon the notice prescribed (Record, p. 207). The purchasers having paid $50,000, and tendered 1,069 out of the 1,160 bonds secured by the mortgage foreclosed, the sale was confirmed. An appeal was allowed to said Davis at the foot of the decree of confirmation (Record, p. 207). The condition upon which the appeal was to operate as a supersedeas was not complied with.

It is understood that the appellant intends to present both his appeals :

1. Appeal from the decree of sale.

2. Appeal from the decree of confirmation.

The appellant's interest in the cause rested upon his allegation that he was a stockholder of the defendant railway company, and a holder of bonds secured by its mortgage to the complainant.

The record does not disclose what errors the appellant assigns with respect to either of said decrees.

I.

The appellant cannot assert error in behalf of the Kanawha and Ohio Railway Company; he cannot prosecute his appeal as a defendant in the cause.

He alleged that he was a stockholder. He was permitted to be heard for the protection of *his own interests.* He was not permitted to be heard in behalf of the railway company, to represent it in the cause in the Court below, to appeal for it to this Court. There was no pretense of any ground for asking such intervention.

> "A stockholder can be allowed to intervene and contest only when able to show fraud and collusion between the plaintiff in the suit and the officers of the company having charge of its interests."
>
> Forbes vs. Memphis, etc., R. R. Co., 2 Woods, 333.

He came in after order *pro confesso* against the Kanawha and Ohio Railway Company; he was allowed to be heard in the further proceedings, which, by force of Rule 18, were to be *ex parte* in favor of the complainant. He was not allowed to open the issues closed by the order. To permit this would have required the setting aside of the order *pro confesso.* This was not done; it was not asked for.

It is submitted that it was not the intention of the so-called order of intervention—so far, at least, as his stockholder interest was concerned—to give to the appellant the right to become *a party* to the cause at all; that the intention was simply to allow him to make suggestions to be considered by the Court, *in its discretion,* in framing the decree to which the complainant was already determined to be entitled by the order *pro confesso.*

Before Mr. Justice HARLAN it was unsuccessfully

argued that the said order did not in any respect so far introduce Davis into the cause as to give him a right of appeal as a party. There would, however, seem to be no doubt that appellant was allowed to speak only for his own interests; that he could not speak—certainly could not appeal—in behalf of the railway company as a stockholder.

Hence, he cannot prosecute this appeal in any manner *as a defendant.* As a stockholder, he had not the least ownership of the property, or of the equity of redemption. The interest sought to be foreclosed belonged to the railway company, and not in any degree to the stockholders.

Humphreys vs. McKissock, 140 U. S., 304.
Pullman Palace Car Co. vs. Mo. Pac. Ry. Co., 115 U. S., 587.
Porter vs. Railway Co., 120 U. S., 670.

The decree must stand against the railway company. There is no appeal by it, or in its behalf. And the decree standing as to it, what relief with respect to his stockholding interest can be given the appellant?

If it be urged that the decree may be reversed as against all the defendants, then it would seem that the rule as to summons and severance has not been complied with, and the appeal must be dismissed.

Hardee vs. Wilson, 146 U. S., 175.
Inglehart vs. Stansbury, 151 U. S., 68.

For, in the opinion in the latter case, it is said to be the purpose of this rule "to enable the party prevailing in that court [the court below] to enforce his decree against those who do not wish to have it reviewed."

Possibly the proceedings before Mr. Justice HARLAN were sufficient to comply with the rule, although no notice was given to two defendants; but, clearly, they could not be, if the effect was not to sever the cause and allow the decree to stand and be enforced against the three railway companies, subject to no disturbance upon this appeal.

In this connection, it may be noticed that the appeal from the decree of confirmation was accompanied by no proceedings whatever of the nature of summons and severance.

If the appeals can stand here at all, they cannot be supported from the standpoint of the defendants, by reason of the appellant's relation as a stockholder.

II.

The appellant can assert only his own rights as a bondholder, and he has no rights as bondholder in respect to matters resting in the discretion either of the trustee or of the Court.

The trustee represented all the bondholders.

Kent vs. L. S. Ship Canal, &c., Co., 144 U. S., 75, and cases cited.

In matters of discretion the trustee properly considers the wishes of the majority of the bondholders.

Shaw vs. R. R. Co., 100 U. S., 612.
First Nat. Bank vs. Shedd, 121 U. S., 74.

The record shows that there were 1,160 bonds in all, and that 1069—all but 91—were tendered by the purchasers upon application for confirmation of sale. Presumably the holders of the 1,069 approved the course of the trustee.

The appellant was not allowed to intervene to speak for the trust, but only for his own interests. The trustee was actively asserting the rights of all the bondholders, and no other representation of such rights was asked or could have been permitted.

Richards vs. C. & O. R. R. Co., 1 Hughes, 28, 31.
Skiddy vs. R. R. Co., 3 Hughes, 320.

The only errors, if any, which can be asserted upon this appeal are, therefore, such as injured the appellant as a bondholder because of his *rights* as against the mortgagor company, as distinguished from alleged errors in determining what relief should, as matter of discretion, be sought by the trustee in the common interest. His appeal cannot be regarded as against his trustee. He cannot object to what his trustee rightfully asked for.

III.

For the foregoing reasons it is submitted that the decrees should be affirmed or the appeals should be dismissed.

The appellant cannot find anything to object to in his own right, from the very nature of the case. What he has no interest in he cannot urge on appeal.

Inglehart vs. Stansbury, 151 U. S., 62.

The points which follow bear upon positions taken by the appellant at one time or another in the litigation of which this cause was part. It is not believed than such positions can be taken here. They are, however, met without regard to the question of the standing of the appellant.

IV.

The allegations of the amended bill of complaint clearly established the right of complainant to a decree of foreclosure.

A default in the payment of interest on bonds secured by the mortgage had occurred. Hence there was a

breach of the condition. A breach of condition gives a right to foreclose, unless there be a clear and positive exclusion of that incidental right by the terms of the mortgage. The fact that there are special provisions in the mortgage which authorize special remedies, does not deprive the mortgage of this common incident.

The granting clause of the mortgage states that it is made "in order to secure the payment of the principal and *interest*" of the bonds. Furthermore, by the second article the mortgagor's right to possession is expressly made to continue only "until default shall be made in the payment of the principal or *interest* of said bonds hereby secured, or some of them." The case is in this respect, therefore, within the language of the opinion of the Supreme Court in the Chicago, &c., R. R. Co. vs. Fosdick (106 U. S., 47), in which the Court says:

> "But, inasmuch as by the terms of the first article the conveyance is declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and by the fourth article the mortgagor's right of possession terminates upon a default in the payment of interest as well as principal, on any of the bonds, we are of opinion, independent of the provisions of the other articles, that the trustees, or on their failure to do so, any bondholder, on non-payment of *any installment of interest* on *any* bond, might file a bill for the enforcement of the security by a foreclosure of the mortgage and sale of the mortgaged property. * * * It (this right) follows from the nature of the security, and arises upon its face, unless restrained by its terms."

To the same effect:

Morgan's La. & Tex. R. R., &c., Co. vs. Tex. Cent. Ry. Co., 137 U. S., 171.

Mercantile Trust Co. vs. M. K. & T. Ry. Co., 36 Fed. Rep., 221.

Beekman vs. Hudson River, W. S. Ry. Co., 35 Fed. Rep., 3.
Farmers' Loan & Trust Co. vs. Chicago & Atlantic Ry. Co., 27 Fed. Rep., 146.
Alexander vs. R. R. Co., 3 Dillon, 487.
Howell vs. R. R. Co., 94 U. S., 466.
Credit Co. of London vs. Ry. Co., 5 McCrary, 30.
Contract Trust Co. vs. Texas & St. L. R. R. Co., 23 Fed. Rep., 846.
Hall vs. Sullivan R. R. Co., 21 Law Rep., 138.

There is no express provision of the mortgage with respect to foreclosure by proceedings in court, except the 8th paragraph, in which it is provided that in case of default continuing for six months after demand "it shall be *the duty of* and is hereby made *obligatory upon* the trustee," upon application from a certain amount of the bondholders, forthwith to take proceedings to foreclose, or other appropriate proceedings; and the 9th paragraph, which in like manner makes it *the duty of* and *obligatory upon* the trustee, after a year's default, to so proceed upon application of any bondholder. These provisions are intended in the cases provided for to make it compulsory upon the trustee to act. They do not in any degree deprive the trustee of the discretionary power to enforce remedies incidental to the nature of the mortgage, either before the lapse of such period after default or without the application of any of the bondholders.

V.

It was not error to make decree of sale without ascertaining, by reference or otherwise, the liens on the property and determining the priorities.

This was distinctly held in a case where there were unusual reasons for asking for such ascertainment of liens in

First National Bank vs. Shedd, 121 U. S., 374.

If reliance is placed upon any rules of practice in the State Courts, it must fail.

Neither State practice nor State legislation can limit or extend the equity jurisdiction of the Federal Courts.

Mississippi Mills vs. Cohn, 150 U. S., 202.
Thomas vs. Nantahala, &c., Co., 58 Fed. R., 485.
Streight vs. Junk, 59 Fed. R., 321.
Payne vs. Hook, 7 Wall., 425.
Conn. Mut. L. Ins. Co. vs. Cushman, 108 U. S., 51.
Spear on the Federal Judiciary, 753, 754.

VI.

There was no defect of parties making the entry of the decree of sale improper.

In his petition appellant suggested (Record, p. 132) that the bill did not make the Ohio Central Railway Company a party.

The Ohio Central Railway Company was *a prior owner* of the railroad, the Kanawha and Ohio Rail-

way Company having acquired title through foreclosure against Ohio Central Railway Company. In that foreclosure the property passed subject to the Mineral Division Mortgages, and these mortgages were and continued to be prior to the interest of the Kanawha and Ohio Railway Company and its mortgagee.

If the appellant meant to suggest that the mortgagee under such prior mortgages was not a party, the answer is obvious, that a prior mortgagee is "not a usual or necessary party."

Heffner vs. New York Ins. Co., 143 U. S., 247.
Woodworth vs. Blair, 112 U. S., 8.

VII.

It was not error to decree the sale of the entire railroad, which was situated in part in West Virginia and in part in Ohio.

The property was one entire railroad from Corning, Ohio, to Charleston, W. Va., not susceptible properly of division or of sale in separate parts.

Wilmer vs. A. & B. Air Line R. R. Co., 2 Woods, 409, 447.
Turner vs. I. B. & W. R. R. Co., 8 Bissell, 380.
First Nat. Bank vs. Shedd, 121 U. S., 74.
Hammock vs. Farmers' L. & T. Co., 105 U. S., 77.

Equity can compel transfer of property out of its jurisdiction through its jurisdiction over the parties.

Massie vs. Watts, 6 Cranch, 148.

The trust deed passed title to the property in West Virginia to the trustee, The Mercantile Trust Com-

pany, and there remained in the railroad company only the equity of redemption.

Bock vs. Bock, 24 W. Va., 586, 590.

The trustee, holding the legal title, and the railroad company, having the equity of redemption, were both in court and amenable to the decree.

The right of the U. S. Courts to sell in foreclosure roads partly beyond their geographical jurisdiction was established by the case of *Muller vs. Dows*, 94 U. S., 444. The Court there said :

> "The next objection urged against the decree of the Court below is, that it is void, so far as it directed the usual foreclosure and sale of property not within the territorial jurisdiction of the Court.
>
> * * * * * *
>
> "Without reference to English chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity, sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. * * * The mortgagors here were within the jurisdiction of the the Court. So were the trustees of the mortgage. It was at the instance of the latter the Master was ordered to make the sale. The Court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the Master's sale, and directed to make a deed to the purchaser in further assurance. And the Court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made." And the decree was affirmed by the unanimous action of the Court.

The decision in *Muller vs. Dows* confirmed the practice which had before been frequently followed in the United States Courts.

Wilmer vs. Atlanta and Richmond Air Line Ry. Co., 2 Woods, 447.

Rarely, if ever, has a road lying in two States been sold in parts, one under decree of one Court and the other under decree of another. The practice, even where there are two similar suits, is to have but one sale. There is a coincidence of authority. But each decree assumes the right to sell the whole, and the sale is made accordingly.

In Blackburn vs. S. M. & M. R. R. Co., 2 Flippin, 525, 538, Judge HAMMOND says: "The case of *Muller vs. Dows, supra*, settles the law to be that our decree, if given, may include the whole property in all three of the States, where there has been a consolidation as in this case."

In Central Trust Co. vs. Wabash, &c., Ry. Co. (29 Fed. Rep., 620), Judge BREWER said: "Of the propriety of a foreclosure in one Court operating upon the entire property running through several States, and of the validity of a sale made in pursuance of that foreclosure, and the completeness of the title which will pass by such sale, there can be now no longer a question. In the case of *Muller vs. Dows* (94 U. S., 444) that question was put at rest."

In Mercantile Trust Co. vs. M. K. & T. Ry. Co., and Union Trust Co. vs. Same, Judge BREWER, upon the same kind of an objection, in an opinion filed May 24, 1889, which does not seem to be reported, said: "The case of Muller vs. Dows, 94 U. S., 444, sufficiently disposes of any objection arising from this fact."

See, also,

Hand vs. Savannah, etc., R. R. Co., 12 S. C., 314.

Randolph vs. Wilmington, etc., R. R. Co., 11 Phila., 502 (U. S. C. C. Pa.).

Young vs. Montgomery R. R. Co., 2 Woods 606.

Marshall vs. Turnbull (U. S. C. C. N. Y.), 32 Fed. R., 124.
Owens vs. O. C. R. R. Co., 20 Fed. R., 10.

In Wilmer vs. A. & R. Air Line R. R. Co., 2 Woods, 409, Judge Woods held :

> " As the property of the defendant company is one entire and indivisible thing, and as it is all covered by one deed of trust, there seems to be no good reason why this Court should not appoint a Receiver for the whole, even though a part of the property may extend into another State."

Other instances of appointment of Receivers over property extending beyond the territorial jurisdiction are :

Mercantile Trust Co. vs. M., K. & T. Ry. 36 Fed. R., 221.
Blair vs. St. L., H. & R. R. Co., 19 Fed. R., 861.
The Wabash Case, 22 Fed R., 138, 172; 23 Fed. R., 863.
The present Receivership of the Erie Road.
The present Receivership of the N. Y. & New England.
The present Receivership of the Northern Pacific.
The present Receivership of the Union Pacific.

VIII.

There was no error in the decree of confirmation of sale.

So far as it carried into effect the decree of sale, no question can be raised as to it. The sale was made as